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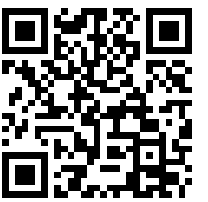

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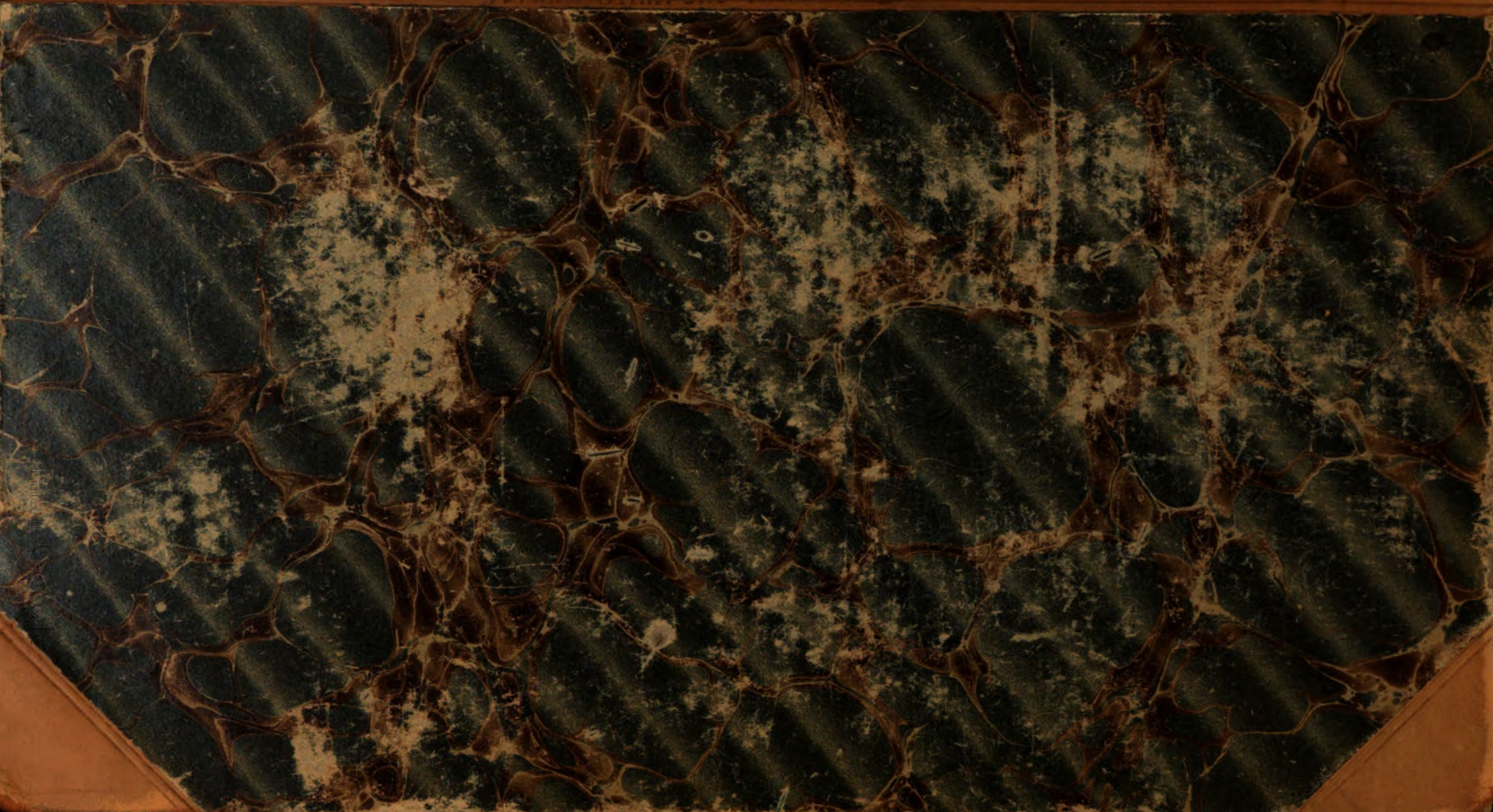

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OF THE

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AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

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CASES

DETERMINED BY THE

CHANCERY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

LUNACY.

In re STRINGER'S ESTATE. SHAW *v.* JONES-FORD.

[1876 S. 268.]

C. A. 1877 M. R. *Jan.* 15: *March* 19. C. A. *June* 12.

Will—Absolute Gift followed by Gift over of Property undisposed of—Devisee dying before Testator—Intestacy—Nomination of Executor—Trust for Next of Kin—Estoppel—Acknowledgment by Tenant for Life of Title of Remainderman.

T. S. by will gave his real and personal estate to his brother *J.*, with full power to sell and dispose thereof by deed, writing, will, or otherwise, and appointed him "sole executor;" but in case *J.* should not dispose of the said real and personal estate, or any part thereof, and not otherwise, the testator gave the same, or such part thereof as he should not dispose of, to *J. H.* for life, with remainders over; and appointed another executor. The testator made various dispositions with special reference to the alternative of the survivorship of himself or *J.* *J.* died in the testator's lifetime.

On the testator's death, in 1803, *J. H.*, claiming as tenant for life under

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the will, entered into possession of the real estate, and remained in possession till his death in 1869. He also received the income of the personal estate from the testator's personal representatives till 1863, when they transferred the capital to him on his indemnifying them. By a deed executed in 1842, the then personal representative had declared that he held the personal estate upon the trusts thereof contained in the will "or such of the same trusts as were then capable of taking effect."

J. H. having by will devised his real and personal estate to the Defendants, the Plaintiffs, who claimed to be entitled to *T. S.'s* real and personal estate under his gift in remainder after *J. H.'s* life estate, brought an action to establish their title against the Defendants, alleging that *J. H.* had acknowledged his title as tenant for life only.

On a demurrer by the Defendants, on the ground that the Plaintiffs had no title:—

Held, by the Master of the Rolls, first (following *Hughes* v. *Ellis* (1)), that the gift of the real and personal estate to *J.* was an absolute gift, and that all the gifts over were void; and that consequently, *J.* having predeceased the testator, there was an intestacy; secondly, that *J. H.* was not estopped from setting up a statutory title to the real estate by his having wrongfully claimed to enter as tenant for life, or by his acknowledgment that he was in possession only as tenant for life; and, thirdly, that, as to the personal estate, *T. S.* having by his will nominated an executor, the will created a trust in the executor for the next of kin; that the only trust of the will at the date of the deed of 1842 "capable of taking effect" was this trust for the next of kin; and that the Plaintiffs had no title either under the will or under that deed.

Demurrer allowed with costs.

The doctrine of estoppel considered and explained.

Held, on appeal by the Plaintiffs, (reversing the decision of the Master of the Rolls on the first point), that, taking into consideration the whole will, the gift to *J.* must be read as a gift to him for life with an absolute power of appointment, and with a gift over if *J.* should die before the testator, or if he should survive but not dispose of the estate; and that in the event which had happened the gift over was valid.

Whether, in the absence of any controlling context, such a gift over would be valid in the event of the devisee dying before the testator—*Quære.*

Hughes v. *Ellis* (1) and *Greated* v. *Greated* (2) questioned.

Statement.

DEMURRER.

This action was brought by *John Ralph Shaw* and *J. A. MacDougall Nicholson* against *Cecil Clare Jones-Ford, J. Cairstairs Jones, W. Cope*, and Sir *C. H. R. Boughton*, for the recovery of certain real and personal estate formerly the property of *Thomas Stringer*, of which the Defendants were in possession.

The statement of claim as amended contained the following statements:—

(1) 20 Beav. 193. (2) 26 Beav. 621.

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Thomas Stringer, late of *Stockport*, in the county of *Chester*, made his will, dated the 28th of February, 1801, and duly attested as then required by law for the devise of real estate, and the same was partly as follows:—"First I give and bequeath unto my brother *John Stringer* all my real and personal estate and effects whatsoever and wheresoever, with full power and authority for him to give, sell, and dispose thereof, or of any part thereof, to such person or persons and for such purposes as he shall think fit by any deed or deeds, writing or writings, or by his last will and testament in writing already executed or hereafter to be executed by him, or otherwise; and I do hereby name and appoint him the sole executor of this my will; but provided he shall not dispose of my said real and personal estate, or any part thereof as aforesaid, then, and not otherwise, I do hereby give, devise, and bequeath my said real and personal estate, or such part or parts thereof as he shall not so dispose of, in the manner following." The testator then devised all his real estates in *Great Britain* in which he had an estate of inheritance (except those held on mortgage or trust) to the use of *John Hesketh*, the youngest son of *Robert Hesketh* the elder, during his life, with remainder to trustees to preserve the contingent remainders, with remainder to the use of the first and every other son of *John Hesketh* successively in tail male, and in default of such issue to the use of *Robert Hesketh* the younger, the second son of the said *Robert Hesketh* the elder, for life, with remainder to trustees to preserve the contingent remainders, with remainder to the use of his first and other sons successively in tail male, with remainder to the use of *John Stringer*, of *Stockport*, cotton manufacturer, for life, with remainder to the use of his first and other sons successively in tail male, with remainder to the testator's own right heirs on the part of his mother for ever. And after giving divers legacies and annuities, the testator gave to *Robert Hesketh* the elder and *M. Daintry*, their executors, administrators, and assigns, all his household goods, plate, china, and other household furniture about his dwelling-house, upon trust to permit the same to remain as heirlooms for the use of all such persons as for the time being should be entitled to the freehold of his said house by virtue of any devise or limitation thereof by his said will. And

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as to all the residue and remainder of his estate and effects whereof or wherein he was, or at the time of his death might be seised, possessed, or interested, not thereinbefore disposed of (subject to the payment of his debts, funeral and testamentary expenses, and legacies), he gave, devised, and bequeathed the same to his executors thereinafter named, their heirs, executors, administrators, and assigns, upon trust with all convenient speed after the decease of the survivor of himself and his said brother absolutely to sell and dispose of the same, and to invest the money so to arise, and all other moneys so bequeathed to his executors, in the purchase of freehold hereditaments in *Stockport* or elsewhere in the county of *Chester* or in *England;* and to settle and assure the hereditaments so to be purchased to and upon the like uses and trusts as thereinbefore declared concerning his real estates of inheritance thereinbefore devised, or as near thereto as existing circumstances would permit. And he appointed the said *Robert Hesketh* the elder and *M. Daintry* executors of his will. The will contained in several other places the expression "the survivor of myself and my said brother."

The testator died in March, 1803, and the will was proved by *Robert Hesketh* the elder alone, the other executor having renounced probate.

John Stringer, the testator's brother, died in the testator's lifetime, having by his will, dated in October, 1802, given all his real and personal estate to his brother, the testator *Thomas Stringer*.

Robert Hesketh the elder (who afterwards went by the name of *Robert Bamford Hesketh*) administered the testator's personal estate, and set apart the surplus, amounting to more than £3000, upon the trusts declared by the will.

John Bamford Hesketh (in the will called *John Hesketh*), the youngest son of *Robert Bamford Hesketh*, entered into possession of the real estate of the testator as devisee for life under the will, and continued in possession, and also received the income of the surplus of his personal estate, till his death. He died in 1869, having had only one son, who died before him an infant and unmarried.

Robert Bamford Hesketh the younger (in the will called *Robert Hesketh* the younger), and also *John Stringer* of *Stockport* (who

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was a different person from *John Stringer* the testator's brother), predeceased *John Bamford Hesketh* without having had any male issue.

At the time of the death of *Thomas Stringer*, his right heir *ex parte maternâ* was *William Nicholson*, under whom the Plaintiffs claimed.

Robert Bamford Hesketh the elder died in January, 1815, having by his will, dated the 25th of May, 1811, appointed his son, *Lloyd Hesketh Bamford Hesketh*, his sole executor.

Lloyd Hesketh Bamford Hesketh, who had thus become the legal personal representative of *Thomas Stringer* as well as of *Robert Bamford Hesketh* the elder, possessed himself of the residue of the personal estate of *Thomas Stringer*, and invested a portion of it in his own name in the purchase of £3175 19*s.* 9*d.* Consols.

By a deed-poll, dated the 8th of October, 1842, *Lloyd Hesketh Bamford Hesketh* covenanted and declared that he, his executors and administrators, would stand possessed of and interested in the said sum of £3175 19*s.* 9*d.* Consols upon the trusts and subject to the powers and provisions in and by the wills of *John Stringer* and *Thomas Stringer* respectively expressed and declared concerning the residue of their estate and effects, or such of the same trusts, powers, and provisions as were then capable of taking effect.

Lloyd Hesketh Bamford Hesketh died in 1861, having by his will appointed the Defendant Sir *C. H. R. Boughton*, and another person since deceased, his executors, who after his death transferred the said sum of £3175 19*s.* 9*d.* Consols into their names.

Lloyd Hesketh Bamford Hesketh during his life, and his executors after his death, paid the dividends on the last-mentioned sum to *John Bamford Hesketh*, as the person entitled thereto for his life, under the trusts of the will of *Thomas Stringer*, until the month of April, 1863, when Sir *C. H. R. Boughton* and his co-executor transferred the stock into the name of *John Bamford Hesketh*, who by deed dated the 4th of April, 1863, covenanted to indemnify the Defendant Sir *C. H. R. Boughton* and his co-executor, and the estate of *Lloyd Hesketh Bamford Hesketh*, from all losses which might be incurred by them in consequence of such transfer.

John Bamford Hesketh, by his will, dated the 28th of June, 1862, after devising certain real estate in the county of *Denbigh*,

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gave and devised all the residue of his real and personal estate unto and to the use of the Defendants *J. C. Jones* and *W. Cope*, upon certain trusts for the benefit of his grandson, the Defendant *Cecil Clare Jones-Ford*, and appointed them his executors. He died in the year 1869, and *J. C. Jones* and *W. Cope* entered into possession of the real estate of *Thomas Stringer*, and of the said sum of consols, and the residue of his personal estate, as trustees for the Defendant *Cecil Clare Jones-Ford*, who was an infant.

John Bamford Hesketh always during his life admitted that he held the sum for his life only, as devisee thereof under the limitations of the will of *Thomas Stringer*; and, amongst other acknowledgments, he wrote a letter after the death of his son in July, 1839, to *John Ralph Shaw*, one of the Plaintiffs, as follows:—

"In answer to yours of the 5th instant, I beg to inform you that, owing to a most melancholy event that lately happened in my family, you, as the next heir, will be entitled to the *Stockport* property after my death, unless I have again a male heir, which, from my very bad health, seems at present very improbable."

Robert Bamford Hesketh, and the other legal personal representatives of *Thomas Stringer*, also recognised and admitted the title of *John Bamford Hesketh* as tenant for life under the trusts of the will of *Thomas Stringer* declared of his residuary estate, and that they held the said funds, subject to such life estate, in trust for the persons entitled thereto in remainder under the said trusts.

The Plaintiffs claimed to establish their title to recover possession of the real and personal estates devised and bequeathed by the will of *Thomas Stringer*, and the rents and profits accrued since the death of *John Bamford Hesketh*, and to have the subsisting trusts of his will carried into execution.

The Defendants *Cecil Clare Jones-Ford*, *J. C. Jones*, and *W. Cope* demurred to the original statement of claim on the ground that the Plaintiffs shewed no title to the property in question.

The demurrer was heard before the Master of the Rolls on the 15th of January, 1877.

Argument.

Davey, Q.C., and *Medd*, for the demurrer of the Defendants *C. C. Jones-Ford* and others, contended that the gift in the will of

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Thomas Stringer of his real and personal estate to his brother *John Stringer* was an absolute gift, and that the gift over of such parts as he should not dispose of was void for repugnancy. Therefore the whole of the limitations of the will, under one of which the Plaintiffs claimed, failed, and there was an intestacy as to both real and personal estate. They relied on *Holmes* v. *Godson* (1), *Hughes* v. *Ellis* (2), and *In re Wilcock's Settlement* (3).

Argument.

Bagshawe, Q.C., and *Bevir*, for the Plaintiffs, admitted that if *John Stringer* had survived the testator, the gift over would possibly have been void; but contended that as he had died before the testator, and so the gift to him never took effect, the gift over was good. They cited *Evers* v. *Challis* (4); *Avelyn* v. *Ward* (5); *Meadows* v. *Parry* (6); *Jones* v. *Westcomb* (7).

Macnaghten, for Sir *C. H. R. Boughton's* demurrer.

JESSEL, M.R.:—

Judgment, M.R.

I do not think the question is open to fair argument before me. There is a decision in point more than twenty years old, namely, *Hughes* v. *Ellis*, which is not contravened by any other authority, and therefore I have no right to overrule it. I have not fully heard the argument on the point, but I do not feel inclined to differ from that case. Even if I differed from it, I should not overrule it, but should let you go to the Appeal Court. The demurrer must, therefore, be allowed.

Bagshawe asked for leave to amend the statement of claim in order to raise more clearly the case that the Defendants had admitted that they were in possession under the limitations of the will, and were estopped from denying the Plaintiffs' title.

The MASTER OF THE ROLLS gave them leave to amend.

The statement of claim was accordingly amended, and several of the allegations stated above were then introduced, particularly

(1) 8 D. M. & G. 152.
(2) 20 Beav. 193.
(3) 1 Ch. D. 229.
(4) 7 H. L. C. 531.
(5) 1 Ves. Sen. 420.
(6) 1 V. & B. 124.
(7) Prec. Ch. 316.

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the statement of the deed-poll of the 8th of October, 1842, by *Lloyd Hesketh Bamford Hesketh*, the deed of the 4th of April, 1863, by which *John Bamford Hesketh* covenanted to indemnify the estate of *Lloyd Hesketh Bamford Hesketh*, the letter of *John Bamford Hesketh* to the Plaintiff of July, 1839, and the allegation of admissions by the personal representatives of *John Stringer* with respect to the personal estate of the testator.

The Defendants again demurred to the amended statement of claim, and the demurrer was heard on the 19th of March.

Argument.

Davey, Q.C., and *Medd*, for the demurrer of the Defendants *C. C. Jones-Ford* and others:—

Your Lordship has already decided that the gift in the will of *Thomas Stringer* to his brother *John Stringer* was an absolute gift. *John Stringer* having died in the testator's lifetime, there was an intestacy, but *John Bamford Hesketh*, through whom we claim, on the testator's death entered into possession and acquired a good title by adverse possession, and the fact that he may have considered himself in possession as tenant for life only is immaterial: *Paine* v. *Jones* (1). It is clear, therefore, that the Plaintiffs have no title.

[They were stopped by the Court.]

Bagshawe, Q.C., and *Bevir*, for the Plaintiffs:—

With regard to the real estate, we say that *John Bamford Hesketh* having entered, according to his own admission, as tenant for life under the will, the Defendants claiming through him are estopped from denying the validity of the will and the title of the remainderman under it: *Board* v. *Board* (2); *Anstee* v. *Nelms* (3); *Asher* v. *Whitlock* (4); *Hawksbee* v. *Hawksbee* (5); *Attorney-General* v. *Munro* (6); *Stone* v. *Godfrey* (7); *Pole* v. *Pole* (8).

Then as to the sum of consols representing the testator's residuary personal estate, the deed-poll of the 8th of October, 1842,

(1) Law Rep. 18 Eq. 320.
(2) Ibid. 9 Q. B. 48.
(3) 1 H. & N. 225.
(4) Law Rep. 1 Q. B. 1.
(5) 11 Hare, 230.
(6) 2 De G. & Sm. 122.
(7) 5 D. M. & G. 76.
(8) 2 Dr. & Sm. 420.

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expressly declares that it shall be held upon the trusts of the will. The deed in fact constituted an appropriation of the fund to answer the trusts declared by the will, and no others.

Macnaghten, for Sir *C. H. R. Boughton's* demurrer.

JESSEL, M.R.:—

This case originally came before me on the supposed doctrine that though the gift over by the will after the death of *John Stringer* would have been void if he had survived the testator, it became valid because he died in the lifetime of the testator; but I declined to accede to such a doctrine. It now comes before me on, it is said, this doctrine, that because the person named in the will as tenant for life, having no title, had entered claiming as tenant for life, thereupon on his death the supposed remainderman, who has no title either, can recover against his devisees in ejectment, or, as we call it now, in an action for recovery of land, under some notion of estoppel.

As I understand the law, the man who recovers land must recover it on his own title, and, according to my former decision, supposing it to be correct, the remainderman has no title at all: therefore he ought not to be able to recover the land.

But then it is said, the tenant for life entered claiming as tenant for life, having no title whatever, and because he claimed as tenant for life, and for many years thought he was, till he found out his mistake, therefore he cannot deny there was a remainder, that is to say, because a man wrongly claimed and succeeded in his wrong claim, he cannot suggest that anybody else may have a wrong claim. I do not understand that at all.

I do understand the doctrine of the numerous cases cited, which may be divided into two classes. The first is that where a man having no title obtains possession of land under a demise by a man in possession, who assumes to give him a title as tenant, he cannot deny his landlord's title; as, for instance, if he takes for twenty-one years and he finds the landlord has only five years' title, he cannot after the five years set up against the landlord the *jus tertii*, though, of course, the real owner can always recover against him. That is a perfectly intelligible doctrine. He took posses-

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sion under a contract to pay the rent as long as he held possession under the landlord, and to give it up at the end of the term to the landlord, and having taken it in that way he is not allowed to say that the man whose title he admits, and under whose title he took possession, has not a title. That is a well-established doctrine. That is estoppel by contract.

Another class of cases, of which several instances were referred to, is this: A man is in possession of land with a defective title, but he has possession. In fact, under the old law, he could not have devised without, except in the case of certain reversions. He devises to a man for life with remainder over. The devisee, having no title except under the will, enters under the will. It has been held that he cannot deny that the testator had a right to devise in the way he has devised; that is, that the testator had a sufficient title to support the devise as far as the devisee is concerned—not to make the devises valid which were invalid, because the devises were invalid *per se* if the testator had insufficient title.

Therefore the whole of the estoppel is this: you have entered under the will of a man who had possession as far as you are concerned: possession is the fee: you cannot say, you having no title, that he had less than the fee which he purported to devise. You are estopped from denying his title to dispose of that fee, though you may have found out afterwards that he was only tenant for years, or tenant from year to year, or tenant for life, or anything else. You have got possession under that will, and possession in law, as far as you are concerned, of the fee. All that I understand. That is a little extension of the doctrine of estoppel by contract, but it follows on the same principle.

But now we come to a suggested third extension, and that is this: A man enters under a will which contains an invalid devise. It is alleged that by claiming under that will and getting possession he affirms the invalid devise. Now, I cannot see the distinction suggested between the case where the remainder is invalid as well as the tenancy for life, and the case where the remainder alone is invalid. If he enters rightfully as tenant for life, and the next remainder is invalid, it is admitted that will not make the remainder valid, because he had only a right to his tenancy for

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life: but he only claims as tenant for life; he admits throughout that he is tenant for life, and he pays charges as tenant for life. He enters, not upon the ground that he admits the title of the remainderman, but upon the ground that he claims as tenant for life.

But if he himself enters without title, it is said that because he has no title himself his entry gives a new title to the remainderman. I cannot see it. Suppose the defect in the tenancy for life is a different defect from that of the remainderman: suppose the gift to him was void for remoteness, and the gift to the remainderman was void as being to a charity, or *vice versâ*. How can it be said that his entry, though wrongful as tenant for life, estops him from doing anything? Why cannot he set up the defect against the remainderman? Can it make any difference if it happens to be the same defect? Why can he not admit the defect, and say, "I find now I have no claim to the property"? It does not appear to me to be within the doctrine of estoppel at all; neither within the principle of the doctrine, nor within the authorities which established the doctrine; and all I can say is, if the doctrine is to be extended, it must be by some other Court and not by me. That, I think, disposes of the part of the case which relates to the real estate.

The personal estate stands on rather a different footing. The gift of the residue, as our law stands, was void according to my construction of this will: not void as a gift of residue, because the executor takes it, but void as regards the beneficial interest. The executor was not therefore, like the tenant for life of the real estate, wrongfully in possession of the personal estate, but rightfully in possession of the personal estate; and he rightfully held it as trustee for the next of kin. That appears to me to dispose of the whole argument, because the sole executor who proved the will was *Robert Hesketh* the elder, and he held the property as a bare trustee for the next of kin.

Then *Robert Hesketh* the elder dies in 1815. Now, as I understand, up to that moment, the original testator having died in 1803, the next of kin were entitled to have this money, about £3000, to be set apart and appropriated as part of the residue.

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The next of kin were clearly entitled to it. *Robert Hesketh* dies, and *Lloyd Hesketh* becomes his legal personal representative; that is, as I understand it, legal personal representative of the testator. Therefore, *Lloyd Hesketh*, in 1815, was a trustee for the next of kin. How could he by any declaration of trust get rid of his trust? He was a trustee for the next of kin succeeding a trustee who had set apart and appropriated the fund. I do not see how he got rid of it. He died in 1861, having in October, 1842, many years before, executed a declaration of trust by which he says this money was to be held on the trusts concerning the residue, or such of the trusts as were then capable of taking effect, and none of the trusts were in law capable of taking effect, excepting that trust which the law imposes upon an executor as being trustee for the next of kin. That was a trust, and a trust created by the will, because the nomination of the executor makes the executor a trustee in our law and nothing else. It is a trust of the will, and created by the will.

If there had been no executor the next of kin would have taken, but the nomination of the executor vests the personal estate in the executor as trustee for the next of kin. Therefore there was a good trust for the next of kin created by that will by reason of the naming of the executor who proved it, and therefore there was, in my opinion, a good trust for the next of kin capable of taking effect.

It does not appear to me, therefore, that the declaration of trust gave, as it has been argued, any further title to the persons claiming under the will than they would have had without it.

In other words, the next of kin appear to me up to that time to have had a title. As to the question whether they have since lost that title or not, I give no opinion, for it is not before me now; but it does not appear to me that any further title could have been acquired under the will by reason of the act of *Lloyd Hesketh* in 1842, which was not possessed before.

That being so, it seems to me that the claim as regards the personal estate does not depend on the doctrine of estoppel at all. *Lloyd Hesketh* died in 1861. He made his will, and his executors transferred the fund in 1863 to *John Bamford Hesketh*, who appa-

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rently had no title. Whether or not that destroys the title of the next of kin it is not for me to say now, but certainly it cannot be an act of estoppel to give the Plaintiffs any title. The fund has simply been transferred to the wrong man; therefore, according to this claim, even *John Bamford Hesketh* had no title.

It appears to me that as regards the personal estate the claim fails simply for want of title to the property.

On all these grounds the demurrers must be allowed, with costs.

From this decision the Plaintiffs appealed. The appeal was heard on the 12th of June.

Bagshawe, Q.C., and *Bevir*, Q.C. (*De Castro* with them), for the Appellants:—

We contend, in the first place, that the limitations in the will subject to the gift to *John Stringer* are valid; and, in the second place, that the conduct of the Defendants has estopped them from denying the title of the Plaintiffs.

As to the first point, the effect of the gift is to give an estate for life to *John Stringer*, with a general power of appointment. This is clear from the whole scope of the will, and the Court cannot construe such a claim as this without having recourse to the whole will, in order to ascertain the intention of the testator.

But confining our attention to the words of the clause itself, the gift over may still be supported. Admitting that there is a gift in fee of the real estate and an absolute gift of the personalty, a gift over, if the devisee does not dispose of it, is not void if the devisee never actually becomes entitled to any interest. *John Stringer* died before the testator, and his name may be struck out of the will. In this respect the case differs from *Holmes* v. *Godson* (1), and the other cases relied on by the Defendants. It is an alternative gift, and comes under the authority of *Doe* v. *Glover* (2) and *Hall* v. *Warren* (3).

JAMES, L.J.:—We will hear the counsel for the Defendants on this point before proceeding to consider the second question.

(1) 8 D. M. & G. 152. (2) 1 C. B. 448.
(3) 4 K. & J. 603; 9 H. L. C. 420.

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Argument.

Joshua Williams, Q.C., and *Davey*, Q.C. (*Medd* with them), for the Defendants:—

It is impossible to construe the words of the gift to *John Stringer* except as an absolute gift. The words are, "all my real and personal estate and effects," and the devisee is to have power to dispose of them by deed, will, or otherwise: *Doe* v. *Thomas* (1); *Bradley* v. *Westcott* (2); *Tomlinson* v. *Deighton* (3). That being so, it follows that the gift over is void for repugnance: *Barton* v. *Barton* (4); *Holmes* v. *Godson* (5); *Greated* v. *Greated* (6); *Monypenny* v. *Dering* (7); *Proctor* v. *Bishop of Bath and Wells* (8).

[BAGGALLAY, L.J., referred to *Sherratt* v. *Bentley* (9).]

The fact that the devisee died in the lifetime of the testator cannot make a gift valid which was in its inception void for repugnance. The express point was decided in *Hughes* v. *Ellis* (10).

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am of opinion that the demurrer in this case ought not to have been allowed, but ought to have been overruled. I concede entirely the arguments which have been addressed to us by Mr. *Williams* and Mr. *Davey*, that the words "I give and bequeath unto my brother *John Stringer* all my real and personal estate and effects whatsoever and wheresoever" would have given the fee simple of the realty and an absolute property in the personalty, and that the superadded words "with full power and authority for him to give, sell, and dispose thereof, or of any part thereof, to such person or persons and for such purposes as he shall think fit, by any deed or deeds, writing or writings, or by his last will and testament in writing already executed, or hereafter to be executed by him or otherwise," were merely superfluous words, *quæ non nocent*, and would have left the absolute gift untouched. It is settled by authority that if you give a man some property, real or personal, to be his absolutely, then you cannot by your will dis-

(1) 3 A. & E. 123.
(2) 13 Ves. 445.
(3) 1 P. Wms. 149, 170.
(4) 3 K. & J. 512.
(5) 8 D. M. & G. 152.
(6) 26 Beav. 621.
(7) 2 D. M. & G. 145.
(8) 2 H. Bl. 358.
(9) 2 My. & K. 149.
(10) 20 Beav. 192.

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pose of that property which becomes his. You cannot say that, if he does not spend it, if he does not give it away, if he does not will it, that which he happened to have in his possession, or in his drawer, or in his pocket at the time of his death, shall not go to his heir at law if it is realty, or to his next of kin if it is personalty, or to his creditors who may have a paramount claim to it. You cannot do that if you once vest property absolutely in the first donee. That is because that which is once vested in a man, and vested *de facto* in him, cannot be taken from him out of the due course of devolution at his death by any expression of wish on the part of the original testator. But that, I should have thought, did not apply to a case where the original gift never did take effect at all, because then there is no repugnance. There may be repugnance between the gift over and the gift intended to be made, but I am not quite sure that that ought to have applied to a case, supposing the point arose, where there was simply the death of the person creating a lapse. True, there are two authorities cited of the late Master of the Rolls, *Hughes* v. *Ellis* (1) and *Greated* v. *Greated* (2), one of which seems to me very similar to this case. I think, if it were necessary for us to deal with these cases, I should be slow to express my assent to them. But it appears to me that upon the true meaning of this will, taking, as we are bound to take, not only this particular clause, but every part of the will, into consideration, the testator has in the plainest manner possible, short of express words, provided for the event of his brother's death. In the first place, I should say that I think that the better construction of this will is, that the testator only made his brother tenant for life, because you have not only got those words, that is to say, the gift and power superadded, and a gift over if he does not in terms execute that power, but you have subsequent gifts which would seem to be wholly inconsistent with there being an absolute gift in the first place to the brother. First of all, there is an appointment of executors. It seems to me to be wholly irreconcilable, upon any ordinary principle, with the notion that he was only dealing with that which the brother should not have spent or given away in his lifetime. The words are, "I give and bequeath unto the said *Robert Hesketh* the elder and *Michael*

(1) 20 Beav. 192. (2) 26 Beav. 621.

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Daintry (my executors), their executors, administrators, and assigns, all my household goods, china, and other household furniture . . . and as for and concerning all the residue and remainder of my estates and effects of what nature or kind soever and wheresoever situate, . . . I do hereby give, devise, and bequeath the same unto my executors hereinafter named, their executors, administrators, and assigns, upon the trust and to the intent and purpose that they or the survivor of them, or the heirs, executors, or administrators of such survivor, shall and do with all convenient speed"—not after the decease of the brother, but—"after the decease of the survivor of me and my said brother absolutely sell and dispose, &c." That means "as soon as conveniently may be after the decease of my said brother, if he shall survive me, but immediately after my decease if I shall survive him." All that seems to be absolutely inconsistent with the notion that the testator had given everything to his brother if his brother survived him, and that he was only purporting to deal with that part of his property which the brother should not have been minded to have disposed of in his lifetime.

Then when we look at the rest of the will—and I think that on this demurrer we are at liberty to look at the whole will—we find that it is full of gifts to take effect after the death of the survivor of the testator and his brother. There is a gift to a housekeeper who may be in their service at the time of the death of the survivor. Then there is a gift of an annuity to take effect upon the death of the survivor, and so on; and other gifts of the same character.

I am of opinion that all these things shew, and lead to the necessary implication, that the testator was not, in the subsequent part of his will, merely dealing with the part of his estate which should be left undisposed of by his brother; that he meant to make provision for that which might occur in the case of the brother's death in his lifetime. I think the natural and proper meaning of it would be, taking the whole context of the will, to say, notwithstanding there is a gift, in the first instance, of the real and personal estate in terms purporting to be an absolute gift out and out of the whole, that the gift is cut down to an estate for life with that which is practically exactly the same thing, an absolute

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power of appointment and disposal in any way in which the legatee might think fit. At all events, if it is not that, there is abundant evidence, to my mind, upon the whole context of this will, that the testator did intend to apply the directions he has made to the event, among others, of his being the survivor of the two, his brother and himself, which would necessarily imply a gift in case of the death of his brother in his, the testator's, lifetime; and that this is no straining of the words of the will, if you read, "But provided he shall not dispose of my real and personal estate or any part thereof," as meaning "But provided he shall not live to dispose of my real and personal estate or any part thereof, or, if living, shall not dispose of them, then I do hereby give it in manner following."

Whichever way you take it, it seems to me the real meaning of the gift over is that it was to be in case the brother did not live to dispose of, or, if living, did not dispose of, the real estate. That being so, it appears to me the gift over is not made void by those words by its being, as it is said to be, a violation of the rule that a man cannot create a new course of devolution in a gift once given, for that is what I hold to be the meaning of the word "repugnant."

I am of opinion that the demurrer ought to have been overruled.

BAGGALLAY, L.J.:—

I am of the same opinion. It appears to me that, when you consider it, the primary gift in favour of the brother *John Stringer* is divided into three portions, the gift itself, the power conferred, and the gift over in the event of the power not being exercised. Now there can be no question upon the words of the gift, taken *per se*, that they give an estate of inheritance in the freehold property and real estate, and an absolute interest in the personal property. So, also, as regards the power conferred. If we stop with the power so conferred it is merely conferring on the devisee and legatee a power of doing that which would have been incidental to the estate previously given to him. But when we come to take into consideration the gift over in default of the power being exercised, then the fact of the power having been pre-

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viously given becomes of some importance, and it is the duty of the Court to reconcile, as far as it can, all the various provisions contained in the will, so as to give effect to a reasonable construction of the whole will. We find the gift over is in the following terms, "provided he" (that is, his brother) "shall not dispose of my said real and personal estate, or any part thereof as aforesaid," and then there is another disposition of the property. Now I quite agree that if that proviso was only to take effect in the event of the brother surviving the testator, and not disposing of the property pursuant to the power previously given to him, the proviso would be repugnant, and might be rejected on that account. But I am of opinion that it was the intention of the testator to provide by his will as well for the case of his brother dying in his lifetime, and therefore never having an opportunity of exercising the power of appointment, as for the case of his brother surviving him, and thereby only exercising it to a partial extent. I think that is abundantly clear when you have regard to the other parts of the will, because we find a constant reference to the survivorship not only of the brother of the testator, but also of the testator himself, in other words, to the alternative of his brother predeceasing him. A number of legacies are to be paid on the decease of the survivor, whichever may happen to be the survivor; certain parts of the estate are to be sold on the decease of the survivor, whichever may happen to be the survivor; and then, as regards the other portions of the property, they are to be inventoried immediately on the death of the testator himself, and henceforth they become heirlooms. All these directions throughout the will appear to me to point out clearly that the testator intended in the proviso, or rather in this gift over, in the event of the power not being exercised, to provide for the case of its not being exercised by reason of his brother never having the opportunity of exercising it, as well as for the event of his brother having the opportunity of exercising it, but not doing so to the fullest extent.

Then, if that is the true interpretation to be given to this gift over, it comes to the same thing as if he had said, "Provided my brother shall die in my lifetime, or provided he shall survive me and not exercise the power hereinbefore given, then I give the

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estate over." On the whole, I think that the only way to give effect to all the provisions in the will is to hold that the testator gave to his brother a life estate with a power of appointment and disposition over the real and personal estate, and with regard to that real and personal estate as to which there was no exercise of the power or disposition, the various provisions of the afterpart of the will were to take effect.

BRAMWELL, L.J.:—

I am of the same opinion.

Solicitors for Plaintiff: *G. L. P. Eyre & Co.*, agents for *Garnett, Tarbet, & Tinne, Liverpool.*

Solicitors for Defendants: *Hughes & Sons; Bennett, Dawson, & Bennett.*

WOOLF *v.* PEMBERTON.

Practice—Infant Plaintiffs—Next Friend—Right of Father to be Next Friend.

A testator gave life annuities to his six nephews and nieces, and directed the residue, which was of large amount, to be accumulated for twenty-one years, and then to be divided among such of the six as should be then living, with a proviso substituting the issue of any who died within that period for their parents. A person nominated by the executors commenced an action against the executors for administration of the estate, as next friend of the infant children of one of the nephews, and at once obtained a decree. The father of the infants, who had no adverse interest to them, and against whom there was no imputation, appeared to have been informed that a suit was pending for the administration of the estate, but was not aware that his children were the Plaintiffs until after the decree had been made. He then applied to be substituted as next friend. *Little*, V.C., refused the application, on the ground that there was no authority laying down that where a suit is about to be instituted on behalf of infants a communication must be made to their father:—

Held, on appeal, that the father ought to be substituted as next friend.

Statement.

JOSEPH GREENOUGH died on the 30th of March, 1877, possessed of property of the estimated value of £250,000 and upwards. By his will he gave an annuity to his wife during widowhood, and a life annuity of £240 to each of his six nephews

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and nieces therein named, and after giving some other annuities and legacies to no great amount, he directed his trustees to accumulate the income of the residue for twenty-one years from his decease, and to stand possessed of the capital and accumulations in trust to divide the same between such of his said nephews and nieces as should be then living in equal shares, with a proviso that if any of them died within that period leaving issue, such issue should take the shares their parents would respectively have taken if living, and with a further proviso giving over half the fund if there should be no takers, except one nephew or niece, or the issue of one nephew or niece, and giving over the whole if there should be no nephew or niece or issue of a nephew or niece who should become entitled.

On the 1st of May, 1877, a decree was made in the Chancery of the County Palatine of *Lancaster* for the administration of the real and personal estate of the testator at the suit of the three infant children of *Joseph Woolf*, one of the nephews named in the will, by *J. R. Price*, their next friend.

On the 4th of June the infants, by the said *Joseph Woolf*, their father and next friend, moved before Vice-Chancellor *Little* that *J. R. Price* might be removed, and that *Joseph Woolf* or some other proper person might be approved of as next friend in the place of *Price*, and that in the meantime all further proceedings in the action might be stayed, and that *Price* might be ordered to pay the costs of the application.

The case made by the father in support of this application was that until the 30th of May he was wholly unaware that an action had been commenced in the names of his children, and that he had never been in any way consulted about the action. It appeared that in the latter part of April the father had an interview with Mr. *Riley*, one of the executors, about the testator's affairs, and again on the 26th of May, on which latter occasion he was informed that a decree had been made for administering the estate. On the 29th of May a document was handed to him for signature, being an authority to the solicitor for the infant Plaintiffs to apply to the Court for maintenance. He did not sign it, but took it away with him. There was some conflict of evidence as to what passed at these several interviews, and Mr. *Riley* deposed that the

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father stated that he had acted as receiver to the testator, and had a claim against his estate, and also that he asked to be employed as receiver again, and expressed a wish that a liberal allowance for the infants' maintenance should be obtained. The case set up by the father appeared, however, to be made out, viz., that he never knew that his children were Plaintiffs until he had read the document tendered to him for signature, and had had it explained to him. *Price*, the next friend, was unconnected with the family, and was nephew to a member of the firm by whom the Defendants appeared. The solicitor of the next friend was the partner of the Defendant *Riley*. The character of the father was not impeached, and there was evidence that he was a highly respectable man of business habits.

Vice-Chancellor *Little* refused the application, saying, "It appears to me that this is a case which really raises this important question of principle, whether there must be, or ought to be, a communication to the father of an infant of an intention to file a bill in the name of the infant, and whether, in default of such a communication, an application is justifiable, or is to be acceded to on the part of the infant, for removing the next friend who has been appointed. I think the case reduces itself to that. If I had found any cases or any *dicta* laying down any such general rule as this, that where a suit is about to be instituted in the name of infants a communication must be, or ought to be, made to their father, or that his judgment ought to be taken as to whether the interests of his children require the institution of the suit or not, I should have followed them. None, however, have been called to my attention, and I must assume that there are none. The case, therefore, is only to be considered with reference to the class of cases which have been referred to, such as *Lander* v. *Ingersoll* (1), *Towsey* v. *Groves* (2), and *Talbot* v. *Talbot* (3), which I think do not in the present case justify the removal of the next friend. At the same time I must say that I think greater freedom of communication to the father ought to have been used by these solicitors, and that the father, therefore, ought not to bear the costs of the application, but that they ought to be costs in the cause."

(1) 4 Hare, 596. (2) 11 W. R. 252.
(3) Law Rep. 17 Eq. 347.

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WOOLF v. PEMBERTON.

Argument.

The infants, by their father, appealed from this decision.

E. S. Ford, for the appeal :—

Talbot v. *Talbot* (1), though not precisely in point, lays down principles which govern the present case. It is not disputed that the suit is a proper one, and for the benefit of the infants; but the father, who is natural guardian of his children, ought not to be passed by when he has no adverse interest and there is no personal imputation upon him, and to institute the suit without communicating with him was improper.

Robinson, Q.C., *contrà* :—

This is a suit in which there may be a present right to maintenance, and in which the father has claims against the estate, both which circumstances raise some conflict of interest. The Vice-Chancellor considered that the father approved of all that had been done, and never thought of an objection till he had consulted his solicitor. It is not clear on the evidence that the father was not informed that his children were Plaintiffs until the time he mentions.

Judgment, Jessel, M.R.

JESSEL, M.R. :—

This is an appeal from an order of the Vice-Chancellor of the County Palatine of *Lancaster*, and I need not say that, it being a judgment of his, I differ from him with some hesitation. But at the same time it does appear to me that in a case of this kind the Court has a plain duty to perform. The case, as I understand it, is this: A father, against whom not a word is to be said, is informed that his infant children take large contingent benefits under a will, and a discussion takes place as to whether anything should be done to protect the interests of the children. In the meantime, and without any information being given to the father, a gentleman, who has been nominated by the executors of that will for the purpose, institutes a suit for the administration of the trusts of that will in the name of the infants as their next friend, and obtains by consent a decree, which I assume to be, and I have no doubt was, a very proper decree, for that administration. It

(1) Law Rep. 17 Eq. 347.

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Judgment, Jessel, M.R.

further appears that although the interests of the children are contingent, there is, at all events, a fair question to be discussed as to whether they are or are not entitled to maintenance out of the funds in which they are contingently entitled, and it is intended to raise that question in the suit. The father then intervenes, and says: "I am the natural guardian of my children; it is for me to consider in what way they should be maintained and educated, and it is for me to judge what is for their benefit both as regards their personal guardianship and the guardianship of their estates; I am the proper person, therefore, to conduct this suit on their behalf, and I ask the Court to intervene under these circumstances in my favour and substitute me as their next friend." It appears to me it requires nothing more than to state these facts to shew the propriety of the application, and that it should have been acceded to. But as the next friend has done nothing wrong in instituting the suit, I agree that it would be right to make the costs both here and in the Court below costs in the action.

James, L.J.

JAMES, L.J.:—

I am of the same opinion. It appears to me that the Vice-Chancellor had really a wider discretion, and a discretion which ought to be more easily exercised, than he appears to have thought. He seems to have considered that the next friend, having instituted a suit in which there was no impropriety, and having taken a decree which was advantageous for the infants, had a sort of vested right to continue the proceedings, which could not be taken away from him except on some sufficient ground, and he did not consider that the non-communication to the father before the institution of the suit of its being about to be instituted was a sufficient ground for depriving the next friend or the next friend's solicitor of that vested right. I am of opinion that is not the right way of looking at the matter, but that, as the Master of the Rolls has put it, the question is, whether the father ought to be deprived of his vested right to look after the interests of his children; whether, where a father has no hostile interest to the children, has been guilty of no default or neglect of any kind, has not rendered it necessary for somebody else to intervene because he refused or declined to do so, the mere fact that a man goes in who is named

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by the Defendants, and is enabled thereby to (what is called) snatch a decree or obtain a decree without delay, can deprive the father of his right in that suit, as in everything else, to assume his proper position and function of guardian of the interests of his infant children.

Judgment, Bramwell, L.J.

BRAMWELL, L.J.:—

I am entirely of the same opinion. I suppose the interests of the infants are concerned in this suit. If so, one would think that if the question were between the father and anybody else, and there was no objection to the father, the father would be the right man to look after those interests. Is that consideration to be set aside because somebody has managed to outstrip—not using the word "managed" as implying anything improper—has in fact outstripped him? It seems to me it ought not to be so.

An order was accordingly made substituting the father as next friend. The costs to be costs in the action.

Solicitors: *Pritchard, Englefield, & Co.; Peckham & Co.*

C. A. 1877 *June* 20.

HUGHES *v.* PRITCHARD.

[1877 H. 54.]

Will—Construction—"Residuary Legatee"—General Words passing Real Estate.

A testator commenced his will by saying, "As to my estate which God has been pleased to bestow upon me, I do make and ordain this my last will and testament, as follows." He then made separate dispositions of two specified farms, then gave several pecuniary legacies, then bequeathed his shares in a quarry, then gave some further pecuniary legacies, and concluded with "and I make *M. P.*, *R. H.*, and *O. P.* my residuary legatees":—

Held (reversing the decision of *Hall*, V.C.), that the testator's freehold estate not specifically mentioned in the will passed to *M. P.*, *R. H.*, and *O. P.*

Statement.

THE Rev. *H. P. Hughes*, by will, dated the 10th of November, 1874, made the following dispositions:—

"As to my estate which God has been pleased in His good pro-

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vidence to bestow upon me, I do make and ordain this my last will and testament as follows (that is to say)."

The testator then devised some freehold land in *Anglesea* to his sister *Mary Pritchard* upon trust to pay an annuity of £10 for the benefit of the persons therein named, and he directed that after her decease the land should become the property of *Mary Ann* and *Hannah Williams*, conjointly to be possessed and enjoyed by them and their heirs for ever, independent of and without the control of any husband or husbands.

He next made some rather informal dispositions of a farm in *Norfolk* for the benefit of his sisters *Harriet Trundle* and *Mary Ann Andrews* during their lives, and after the death of both of them directed that it should descend to his nieces *Maria Andrews* and *Rachel Andrews* for their equal benefit absolutely.

He then gave to the three children of one of his brothers £50 each, and to two children of another brother £100 each, and to his housekeeper £100, and gave his shares in the *Festiniog Slate Quarry* to *Mary Ann* and *Hannah Williams* equally.

He then proceeded as follows:—

"I give and bequeath unto each of my executors the sum of £100, in consideration and for the trouble they undertake in the execution of this my last will and testament, and I make my sister *Mary Pritchard* and brother *Richard Hughes* and my brother-in-law *Owen Pritchard* my residuary legatees. And I do hereby make, ordain, and appoint my sister *Mary Pritchard*, *William Smith*, of *Top Oth Lea*, in this parish, and my brother-in-law Captain *Owen Pritchard*, to be executrix and executors of this my last will and testament." The testator died in June, 1875.

The Plaintiff, who was the heir of the testator, commenced this action against *Owen Pritchard* and *Mary* his wife, and *Richard Hughes*, and by his statement of claim he alleged that the testator was at his death seised in fee of a barn and lands at *Necton* which were not devised by the will, and that the Defendants were in possession of the title deeds thereof and refused to deliver them to the Plaintiff, and that the freehold lands in *Anglesea* produced an income more than enough to pay the annuity charged on them, and that *Mary Pritchard* had in her hands a surplus of such

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income. The claim was to have the title deeds of the *Necton* property delivered up, and for an account of the income received by *Mary Pritchard* from the *Anglesea* property, and payment of the surplus to the Plaintiff.

The Defendants *Owen Pritchard* and wife demurred, and the demurrer was overruled by Vice-Chancellor *Hall*. The Defendants appealed.

Argument.

Morgan, Q.C., and *Pughe Jones*, for the Appellants:—

Pitman v. *Stevens* (1) is in our favour.

[JAMES, L.J.:—Is there any case in which such words as "I make *A. B.* my residuary legatee" have been held not to pass real estate if there have been previous gifts of real estate in the will?]

The case of *Windus* v. *Windus* (2) appears to go nearest to deciding that, but it does not govern the present case. The law is summed up in *Theobald* on Wills (3); *Wilce* v. *Wilce* (4).

They were then stopped by the Court.

Dickinson, Q.C., and *Rigby*, *contrà*:—

We do not admit the last proposition cited from *Theobald* to be a correct statement of the law. It is founded only on *Pitman* v. *Stevens*, which does not support it. *Windus* v. *Windus* and *Kellett* v. *Kellett* (5) are opposed to it.

[JESSEL, M.R., referred to *Jenkins* v. *Hughes* (6) and *Gibson* v. *Fisher* (7) as shewing that the same form of words might have different meanings in different wills.]

Enohin v. *Wylie* (8) contained stronger words denoting an intention to dispose of the testator's whole property than are found in the present will, for here the testator does not say that he means to dispose of all his estate, and yet there was held to be an intestacy as to property not coming within the terms of the particular gifts. It needs a strong context to make the appointment of a residuary legatee affect anything but personalty.

(1) 15 East, 505.
(2) 6 D. M. & G. 549.
(3) Page 64.
(4) 7 Bing. 664.
(5) 3 Dow. 248.
(6) 8 H. L. C. 571, 586.
(7) Law Rep. 5 Eq. 51.
(8) 10 H. L. C. 1.

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JESSEL, M.R.;—

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Judgment, Jessel, M.R.

This is an appeal from a decision of Vice-Chancellor *Hall* as to the construction of a will. It affords an illustration of the difference of opinion between Judges as to the value of a context. I cannot bring my mind to entertain any doubt as to the construction of the will, and, speaking with the greatest possible deference of what the Vice-Chancellor has done, not intimating for a moment that he is wrong any more than I think I am right, I must say that it appears to me, on reading this will, to be reasonably clear that the testator has used expressions from which the Court ought to collect an intention to dispose of the residue of his real and personal estate. He begins in this way: "As to my estate which God has been pleased in His good providence to bestow upon me, I do make and ordain this my last will and testament as follows, that is to say." Then he gives a freehold farm, then he gives another freehold farm, then he gives pecuniary legacies, then he gives a specific legacy, then he gives some more pecuniary legacies, and then he winds up in this way: "And I make my sister *Mary Pritchard* and brother *Richard Hughes*, and my brother-in-law *Owen Pritchard*, my residuary legatees." Then he appoints his sister and Captain *Owen Pritchard*, his brother-in-law, and another person to be executors of his will. Now, what is the meaning of the first words? It appears to me to be reasonably plain that the testator has declared, "I do by this my will dispose of all my estate, real and personal; I intend to do it, and I give it as follows." That is what I understand to be the meaning of those words. They are otherwise useless, and the construction which has been put on the will in the Court below reduces them to nothing, which is not to be done without reason. Then he appoints residuary legatees. I agree that an appointment of residuary legatees standing alone in a will would be a gift of the personal estate only. That is settled by authority. To what extent that ought to be modified by other devises and bequests it is not necessary now to consider, because, looking at the preliminary words, the testator, as it seems to me, has told us in express terms that he has disposed by his will of all his property. That being so, and finding in the will a disposition of parts of his property with that appointment of

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residuary legatees, why are we not to say that the expressions in the former part of the will are entitled to as much consideration as the expressions in the latter part, and that he intended these three people to take the residue of his property? That is my opinion, and I think the appeal must be allowed.

Judgment, James, L.J.

JAMES, L.J.:—

I read the will shortly thus: "In order to make a disposition of all my estate, real and personal, I give *Whiteacre* to *A.*, *Blackacre* to *B.*, £1000 to *C.*, my shares to *D.*, and I make *E.*, *F.*, and *G.* my residuary legatees." I cannot bring my mind to entertain a doubt that the last words are equivalent to "I give the residue of my estate to *E.*, *F.*, and *G.*," and I doubt whether anything but a decision of the House of Lords upon this very will would make me express a different opinion.

Bramwell, L.J.

BRAMWELL, L.J.:—

I need not express my great respect for the opinion of the Vice-Chancellor, nor say that in the case of the construction of a will I should prefer his opinion to my own, but really I cannot, as has been said by the Master of the Rolls and the Lord Justice, entertain a doubt in this case, if I am to use my own faculties, unfettered by any decision or authority upon a case precisely similar. The testator begins by saying, "As to my estate I do make and ordain this my last will and testament." Mr. *Rigby* made a suggestion that the word "whole" was not there, but I have always understood that when you speak of a thing you need not amplify the expression by using the word "whole," and that when a man says, "As to my estate," it is the same as if he had said "As to the whole of my estate." But it is true that though he says "I ordain this to be my last will and testament," if he had omitted to dispose of any portion of it, it would follow then that the intention he had expressed would be unfulfilled as to a part of his estate. But that is not so, because, after giving, as has been observed, gifts of personalty and devises of realty, he finishes in this way: "I make my sister *Mary Pritchard* and the others my residuary legatees," that is to say, legatees of the residue. Residue of what? Why residue of that of which he had been previously

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disposing of parts. Of what had he been previously disposing of parts? Of his realty and personalty, and it seems to me almost a matter of demonstration that he is saying here, residue of my real and personal estate, that is to say, "the estate which God has been pleased in his good providence to bestow on me." If I had to speculate upon what was in the testator's mind at the time, which is not my duty, and to decide upon it, I think it is not at all improbable that he had forgotten this particular farm, which was a small one, at a distance from the place where he resided; but then I am satisfied, on the other hand, that he did not intend to die intestate as to it, and I think it extremely likely that he used comprehensive words in order that anything he had in any way forgotten or omitted to mention might be included. But, as I said before, the question is not what we may speculate to be his intention. If we had to do that, I should say he intended this farm to pass by this residuary devise. What we have to do is to interpret the words he has used, and as I have said before, I cannot entertain any doubt upon it.

Solicitors: *Field, Roscoe & Co.; Simpson, Hammond, Richards, & Simpson.*

KEVAN *v.* CRAWFORD.

Fraudulent Settlement—13 *Eliz. c.* 5—*False Recital*—*Complicity of Wife*—*Jurisdiction*—*Relief against co-Defendant*—*Declaration of Future Interest*—*Costs of Husband and Wife joining in Defence in respect of her Separate Estate.*

C., who carried on the business of a flax spinner at the *S.* mills in partnership with *R.*, by a settlement made in contemplation of his marriage, after reciting that he was indebted to his intended wife in a sum of £20,000, covenanted to pay the said sum of £20,000 to the trustees of the settlement, upon trust that as soon as he should become owner in fee simple of the *S.* mills estate, which he had agreed to purchase, they should advance the said sum of £20,000 to him on the security of the same estate; and it was declared that the trustees should stand possessed of the said sum of £20,000 and the securities for the same upon trust to pay the income to his intended wife for life for her separate use, and after her death to *C.* during his life or until he should become bankrupt, with remainder in trust for the children of the marriage, and in default of children, for his wife absolutely. The

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recital that *C.* was indebted to his intended wife was entirely false, and *C.* was at the time of the marriage in insolvent circumstances; but the wife had no knowledge of the insolvency of her husband, and understood nothing about the recitals or the arrangement as to the £20,000, except that that sum was to be settled. *C.* subsequently purchased the *S.* mills estate, and mortgaged it to the trustees of the settlement for securing £20,000, but no money actually passed between the parties. *C.*, and also his firm, afterwards became bankrupt, and a bill was filed by the trustee in *C.'s* bankruptcy against *C.* and his wife, the trustees of the settlement, and the trustee in the bankruptcy of the firm, praying that the settlement and the mortgage might be set aside as fraudulent against the creditors; and that the rights of all parties might be declared:—

Held (affirming the decision of the Vice-Chancellor of the Duchy of *Lancaster*), that, notwithstanding the falsity of the recitals, the settlement and the mortgage deed were valid against the creditors so far as concerned the interests of the wife and the children:

But *held* (varying the decree of the Vice-Chancellor), that it would be premature to decide any question as to the future life interest of *C.* contingent on his wife's death in his lifetime:

Held, also, that as the Plaintiff's case had entirely failed, the Court had no power to decide any question between the trustees of the settlement and their co-Defendant, the trustee in the bankruptcy of the firm.

The husband and wife having joined in their defence, the bill was dismissed against them both with costs.

Wright v. *Chard* (1) distinguished.

Statement

THIS was an appeal from a decision of Mr. *Little*, the Vice-Chancellor of the Duchy of *Lancaster*.

The Plaintiff, *P. Kevan*, was the trustee in the bankruptcy of *John Crawford*, and the object of the suit was to set aside the settlement made on the marriage of *Crawford* and his wife, and a mortgage to the trustees of the settlement, as being fraudulent against his creditors.

On the 29th of October, 1863, a lease was granted by *E. L. Sidebotham* to *Crawford* of a flax spinning mill called *Shepley Mill* for a term of five years, with an agreement that *Crawford* should purchase the fee simple of the mill upon terms to be fixed by a valuer, who afterwards determined that the purchase should be for the price of £4581 17*s.* 1*d.*, and a perpetual rent-charge of £301 17*s.* 11*d.*

Crawford soon afterwards entered into partnership with *T. Rogerson* in the business of flax spinners, which they carried on

(1) 4 Drew. 702.

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at *Shepley Mill*. He also carried on a similar business at another place on his own account.

In the month of November, 1866, *Crawford*, who was then a widower, married Miss *Emma Putman*. At that time it was proved by the evidence in the suit that he was in insolvent circumstances.

A settlement was executed on the 13th of November, 1866, in contemplation of his said marriage, between *Crawford* of the first part, *Emma Putman* of the second part, and *J. W. Naylor* and *F. Hepworth* of the third part, which recited the lease of the *Shepley Mill*, and recited that *Crawford* had erected divers buildings of considerable value on the land joining part of the *Shepley* works, and carried on the business of a flax spinner thereon, but that no conveyance had yet been made to the said *J. Crawford*, and it then recited as follows:—

"And whereas the sum of £20,000 and upwards now stands to the credit of the said *Emma Putman* in the books of the said business in respect of moneys advanced by her for the use of the said business, and to or for the use of the said *J. Crawford*, and in respect of his interest therein, which sum of £20,000 and upwards is now due and owing to the said *Emma Putman* by the said *J. Crawford*, as they the said *J. Crawford* and *Emma Putman* do and each of them doth hereby admit and declare; and whereas a marriage has been agreed upon and is intended shortly to be had and solemnized between the said *J. Crawford* and *Emma Putman*, and upon the treaty for the said marriage it was agreed that the said sum of £20,000 should be settled upon the trusts thereinafter appearing, and that the said *J. Crawford* should further settle the sum of £10,000 upon the trusts and to be secured in the manner hereinafter appearing."

It was then witnessed that in consideration of the said intended marriage *J. Crawford* covenanted with the trustees that he would on or before the 25th of December, 1867, pay to them the sum of £20,000, part of the said sum so as aforesaid owing by him to the said *Emma Putman*, without any deduction; and it was thereby declared that the trustees should stand possessed of the said sum of £20,000 upon trust that upon payment of the said sum to them, or as soon thereafter as the said *J. Crawford* should become

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the owner in fee of the *Shepley Works* estate, pursuant to the agreement of the 29th of October, 1863, the trustees should then forthwith lend the sum of £20,000 to the said *J. Crawford* upon security of a mortgage of the said *Shepley Works* estate to be given and executed by the said *J. Crawford* to the said trustees with all proper powers and provisions. The settlement then contained powers of calling in and reinvesting the said sum of £20,000, and it was declared that the trustees should pay the income of the said sum of £20,000 and the securities for the same to the said *Emma Putman* for her life for her separate use, and after her death to the said *J. Crawford* during his life, or until he should become outlawed or bankrupt, or should assign the same, or do something whereby it should be vested in some other person. And after the determination of the trust declared in favour of the said *J. Crawford*, the said sum of £20,000 was declared to be in trust for the children of the intended marriage as therein mentioned, and in default of children, in trust for *Emma Putman* if she should survive her husband; but if she should die in his lifetime, in trust for such persons as she should by will appoint, and in default of such appointment, in trust for her executors or administrators. And by the same indenture *J. Crawford* covenanted with the trustees that his executors should pay them within six months after his death the sum of £10,000 upon similar trusts for the benefit of himself, his wife, and children, except that his life interest was not determinable on bankruptcy or alienation, and that the ultimate trust was for his own executors or administrators.

There was no truth in the recital that *Emma Putman* had advanced £20,000 or any other sum to *Crawford* or for use in his business.

Soon after the marriage *Crawford* purchased the fee simple of the *Shepley Mill* estate; and by an indenture dated the 30th of December, 1868, it was conveyed to him in fee simple subject to the yearly rent-charge of £301 17*s.* 11*d.*

On the 10th of February, 1869, an indenture was executed between *Crawford* of the one part, and the trustees of the settlement of the other part, whereby, in consideration of £20,000 expressed to be then advanced to *Crawford* by the trustees, *Crawford*

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covenanted to pay £20,000, with interest at £5 per cent., to the trustees on the 10th of August then next, and conveyed the *Shepley Mill* estate, with the machinery and appurtenances, to the trustees and their heirs by way of mortgage for securing the same sum and interest.

No money actually passed on this occasion. On the 18th of December, 1872, *Crawford* was adjudicated bankrupt in the County Court of *Lancaster*, and the Plaintiff was appointed trustee of his estate.

On the 3rd of March, 1873, the firm of *Crawford & Rogerson* was also adjudicated bankrupt in the same Court, and the Defendant *Butcher* was appointed trustee of their estate. He claimed to be entitled to some share of the *Shepley Mill* property, as part of the partnership estate.

The Plaintiff made various charges in the bill of immoral conduct against Mr. and Mrs. *Crawford* before their marriage, but the charges were absolutely denied, and those parts of the bill were dismissed as scandalous and irrelevant. He also accused Mrs. *Crawford* of being cognizant of the falsehood of the recitals in the settlement, and of the insolvency of her intended husband.

The Plaintiff prayed that the indentures of the 13th of November, 1866, and the 10th of February, 1869, might be declared fraudulent and void as against the creditors of *J. Crawford*, and that the rights of the Plaintiff and the Defendant *Butcher* might be ascertained and declared.

Mrs. *Crawford*, who was a Belgian by birth, stated in her answer that she only knew that her husband was to settle £20,000 upon her at once and £10,000 at his death, and that she did not understand the recitals in the settlement although it was read over to her before its execution; and she denied all knowledge of the insolvency of her husband.

The evidence adduced by the parties on both sides was very voluminous.

The Vice-Chancellor was of opinion that the result of the evidence was that the recital that Mrs. *Crawford* had advanced £20,000 to her husband or for use in his business was entirely false, and that *J. Crawford* was at that time insolvent; but that Mrs. *Crawford* was ignorant of the misrepresentation in the re-

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citals and of the insolvency of her intended husband; and he made a decree to the following effect:—It appearing to the Court that, under the circumstances shewn by the pleadings and evidence, the indenture of settlement of the 13th of November, 1866, was executed by the Defendant *J. Crawford* with intent to defeat and delay his creditors, but that the same was executed by the Defendant *Emma Crawford*, upon consideration of marriage, *bonâ fide*, and without notice of such fraudulent intent on the part of her said husband; and it appearing that the said alleged debt of £20,000 stated to have been then due and owing from the said *J. Crawford* to the Defendant *Emma Crawford*, and thereby covenanted to be paid and secured by the Defendant *J. Crawford* to the trustees, was not so due and owing, and that the covenants for payment and security operated to make the said sum payable out of and chargeable on the estate of the Defendant *J. Crawford*, and not out of or on the estate of the said *Emma Crawford*; dismiss such parts of the Plaintiff's bill as charged the Defendants *J. Crawford* and *Emma Crawford* with immorality, and upon the rest of the said bill declare that the trusts contained in the said settlement for payment of the interest of the said sum of £20,000 after the death of the Defendant *Emma Crawford* to the Defendant *J. Crawford* during his life or till he should become bankrupt, and the trust subsequently declared of the said principal sum of £20,000, so far as the same purported to determine the life estate of the Defendant *J. Crawford*, and to accelerate during his lifetime the operation of the trusts of the said principal sum, were fraudulent and void as against the Plaintiff and the creditors of the said Defendant *J. Crawford*; but that, save as last aforesaid, the trusts and powers of the said settlement in relation to the said sum of £20,000 and the interest thereof, and in relation to the further sum of £10,000 also covenanted to be paid by the Defendant *Crawford* to the trustees, and the interest thereof, were valid and binding so far as regards the Defendant *Emma Crawford* and the issue of her marriage; and that the covenant by the Defendant *J. Crawford* to secure the said sum of £20,000 by a mortgage, and the mortgage of the *Shepley Works* estate executed on the 10th of February, 1869, were valid so far as the Defendant *J. Crawford* was entitled to such estate, or had power to charge it with his

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private debts; and let the following inquiries be made, namely—First, an inquiry of what the property comprised in the mortgage consisted; Secondly, whether any part of such property formed part of the joint estate of his partnership with *Rogerson*, and if so, whether it was subject to a lien in favour of his joint or separate creditors in bankruptcy. His Honour also directed the Plaintiff to pay so much of the costs of the suit as had been occasioned by the charges of immorality against Mr. and Mrs. *Crawford*, between solicitor and client, and the costs of the trustees between party and party, except such parts as were occasioned by the disputed questions of title to the estate which were to form the subject of future inquiries, and reserved such last-mentioned costs and all other costs of the parties to the suit till the result of the inquiries was known.

Statement.

From this decree the Plaintiff appealed on the 19th of April, 1877, and the Defendants *J. Crawford* and his wife gave notice on the 30th of April of their intention to appeal against the inquiries respecting the title to the *Shepley Works* estate, and to ask for the general costs of the suit.

Argument.

Benjamin, Q.C., and *Leresche*, for the Plaintiff:—

The recitals in the settlement respecting the advance of £20,000 by Mrs. *Crawford* being admitted to be untrue, the question is whether they were inserted with a fraudulent intent and whether Mrs. *Crawford* was a party to the fraud. With respect to the husband, the evidence leaves no room to doubt that the recitals were inserted in order to raise a fictitious consideration, and thus to defeat and delay his creditors.

[JAMES, L.J.:—What difference did it make as between the Plaintiff and Mrs. *Crawford* whether it was recited that the money was a debt due to the wife, or that the husband had agreed, in consideration of the marriage, to settle that sum on her?]

Our case is that there was no such sum as that which the husband professed to settle. It was the debt only that was settled, and that had no existence. Therefore the mortgage deed and the trusts of the money secured by it fail. It may be that the covenant to pay the money contained in the settlement and in the mortgage deed was good, and that the trustees may prove under

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it in the bankruptcy: *Ex parte Gardner* (1); but the security on the land was bad, for the husband never paid the money to the trustees, nor did they ever lend it to him again.

With respect to Mrs. *Crawford*, if the Court should be of opinion that there is no case against her of conscious fraud, yet she put herself in the hands of her intended husband, and enabled him to commit a fraud on his creditors. She ought, therefore, to be made responsible for the consequences.

Cotton, Q.C., and *North*, Q.C., for Mr. and Mrs. *Crawford*, were only called on with respect to the direction for inquiries as to the interest of the Defendant *Butcher*:—

Our notice of appeal was given too late, but the Court has full power, under Rules of Court, 1875, Order LVIII., rule 5, to make such order as is just between the parties. The direction for inquiries for the purpose of giving relief between the co-Defendants is quite irregular. If the Plaintiff had succeeded against us, cross relief might have been given between us and our co-Defendant, but this is never done where the Plaintiff's case entirely fails, and the Defendants are entitled to have the suit dismissed.

We also ask for the general costs of the suit, which were not given us by the Vice-Chancellor, who considered himself bound by the authority of *Wright* v. *Chard* (2), but that case is not applicable to the present. If Mrs. *Crawford* had appeared separately from her husband she would certainly have had her costs. Why should she be deprived of them because she joins with him to save expense?

Maclaren, for the trustees of the settlement.

Cookson, Q.C., and *Lake*, for the Defendant *Butcher*:—

Our contention is that the mill was partnership property, and that, assuming the mortgage to be good to the extent of the interest of Mrs. *Crawford* and the children of the marriage, the trustees of the settlement were trustees for the partnership as well as for them. It is therefore important that *Butcher's* interest should be determined in this suit, otherwise we shall be obliged to institute fresh proceedings. The Court has full power to give relief between

(1) 11 Ves. 40. (2) 4 Drew. 702.

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co-Defendants in such a case: *Chamley* v. *Lord Dunsany* (1); *Farquharson* v. *Seton* (2); *Cottingham* v. *Earl of Shrewsbury* (3). The Plaintiff's case has not entirely failed, for he has established his right against *Crawford* to the extent of his contingent life interest in case of her death in his lifetime. As the money settled came from him, the cesser of his life interest on his bankruptcy is invalid, and the life interest would vest in the Plaintiff.

Judgment, Jessel, M.R.

JESSEL, M.R.:—

This is an appeal from a judgment of the Vice-Chancellor of the County Palatine, and raises an important question as to the effect of marriage settlements.

The substance of the case is very simple, although the pleadings and evidence are of enormous length; but I think we are indebted to the way in which Mr. *Benjamin* opened the case, and to the elaborate judgment of the Vice-Chancellor for a great saving of the public time by giving us really what is the substance of the case.

The substance of the case is this: Mr. *Crawford*, who was carrying on business as a flax spinner, was at the time of his engagement to a Belgian lady of the name of *Putman* utterly and hopelessly insolvent. He arranged a marriage with her on the terms, as he says, that he should settle £20,000 on her, she having no property, and he so informed her. He then went to a respectable solicitor, and told him that he was indebted (which was wholly untrue) to Miss *Putman* in the sum of £20,000, and a settlement was made substantially in this shape, reciting that he was indebted to Miss *Putman* in the sum of £20,000, and in consideration of the debt and marriage then intended and about to be solemnized, he covenanted to pay within a short period of time this sum of £20,000 to the trustees named in the settlement to be settled on his wife for life, with remainder to himself for life, with remainder to the children of the marriage, with remainder over. That is the substance of the settlement. There was also a covenant that in case he paid the money it should be advanced to him on mortgage of the mill which then belonged to him, or which he

(1) 2 Sch. & Lef. 690, 718. (2) 5 Russ. 45.
(3) 3 Hare, 627.

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alleged to belong to him, in equity. After the marriage, which took place, the mill was purchased from the vendors pursuant to the agreement, and was conveyed by him by way of mortgage to the trustees as security for £20,000. No money, of course, actually passed. Some time afterwards he became bankrupt, and then these facts appeared. It also appeared that Mrs. *Crawford*, formerly Miss *Putman*, a Belgian lady, was, as she asserted herself to be, imperfectly acquainted with English; that she had no proper solicitor acting for her, though one of the partners in the firm of her husband's solicitors agreed to act for her, and to explain the settlement to her. He says that he explained it to her as well as he could, she being a foreigner, and he says, what I think was believed by the Vice-Chancellor, and certainly appears to me very credible, that being a foreigner, imperfectly acquainted with English, she did not understand it; that all she understood about it was that she was to have £20,000 settled on her. As I said before, the Vice-Chancellor believed her, and I see no reason for disbelieving her.

The result is, that though the settlement contained a false statement that she was a creditor of *Crawford's* for £20,000, she executed it without being actually aware of the falsity of the statement, or that there was any such statement at all. Whether, if she had been aware of it, it would have made any difference or not, it is not material now to inquire.

Under these circumstances, the trustee in bankruptcy says the whole scheme was a deliberate fraud on the part of *Crawford* to cheat his creditors and to put £20,000 aside for the benefit of himself and his wife.

The Vice-Chancellor has taken the view that Mr. *Crawford* knew perfectly well there was no means of paying the £20,000 except out of the creditors' property, he being then insolvent. In that sense, no doubt, the allegation against *Crawford* is made out. But the wife did not know it, she was no party to it. She says she believed Mr. *Crawford* to be a man wealthy and prosperous; he was the owner of one very large mill employing a great number of hands; he was senior partner in a firm which owned another large mill, and all that she expected was a settlement of £20,000. She gave valuable consideration—consideration of marriage.

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Whether that recital were in or were out of the settlement, the covenant to settle the £20,000 in consideration of the marriage would have been a covenant for value, and would have prevailed against creditors. Why should the mere fact of the insertion of an inaccurate or untrue recital vitiate the settlement as regards the wife, who was ignorant and innocent of the fraud? I cannot see why, and I entirely concur with the Vice-Chancellor in the conclusion he came to, that the settlement was for value given by the wife, namely, the consideration of marriage, and that she was no party to the fraud, and that it is unimpeachable on the part of the creditors.

The second argument addressed to us was this: It was said, assuming the settlement to be unimpeachable, and that an action could have been brought on the covenant for the £20,000 before the bankruptcy, and that proof could have been made on the covenant in the bankruptcy as against the bankrupt's estate, yet that the mortgage was invalid, and it was said to be invalid on this ground, that the only bargain in the settlement for the mortgage was in case the husband paid the money; that if he paid the money it was to be lent to him on mortgage, and that he never actually paid the money.

In the first place, assuming everything else was *bonâ fide* in that deed, I cannot see the necessity for the actual payment of the money. The money was payable, and the trustees say, "Instead of paying it in form and getting it repaid to you, do you execute the mortgage at once." The transaction, if *bonâ fide*, appears to me in substance within the covenant of the settlement, and would be sustainable on another ground, that it was a very good mortgage for value, quite independently of the covenant in the settlement as regards making the mortgage, because there was a covenant to pay the money. When the money became due the trustees asked for payment, and they took the substituted covenant in the mortgage to pay at a more distant day—that is, they forbore demanding immediate payment, but took the mortgage by way of security on the covenant to pay at a future day, that is, a mortgage for value, and perfectly valid, there being no fraud suggested in the matter, and none is suggested, assuming the settlement to have been originally valid. It seems, therefore,

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that the mortgage would be equally unimpeachable if there had been no covenant in the original settlement to make the mortgage. On both these grounds I entirely concur with the Vice-Chancellor.

There are, however, some subordinate points as to which there is a cross notice of appeal, upon which I will say a few words.

The Vice-Chancellor, being of opinion that the settlement was valid, dismissed so much of the bill as contained very gross charges, which I am loath to repeat, and which it is not necessary to repeat, against the Defendants, Mr. *Crawford* and his wife, with costs as between solicitor and client. With that part of the judgment I entirely concur. But instead of dismissing the whole of the rest of the bill with costs, he gave no costs; and the ground on which he gave no costs to Mr. and Mrs. *Crawford* was this: not that he was of opinion they were not entitled to costs, but he thought himself bound by a decision of Vice-Chancellor *Kindersley* in *Wright* v. *Chard* (1), to give no costs in a case relating to separate estate of the wife where the husband and the wife joined as co-Defendants. When the case comes to be examined it will be found not to be an authority for any such general proposition. It was a very peculiar case. I am far from saying the particular order in that case was not right, but the general rule is not touched by it. Why should the Defendant be deprived of costs? I can see no reason. I can see very strong reason for giving the costs. In the first instance, the suit is brought against a married woman to deprive her of an estate settled to her separate use. The husband is a formal party only, and not a real substantial Defendant to the suit. The husband is in fact bankrupt. It cannot be, therefore, said the costs will go into his pocket. The fact is, the costs belong to the solicitor, who, as the law now stands, has a charge on the property saved or protected by the result of the litigation. Therefore, to refuse the costs in this case would, as I understand it, be to charge the property of the married woman with these costs in favour of the solicitor, whereas, if we give him the costs, the costs will in the ordinary form of decrees in Chancery, which I believe is also the form in the County Palatine, be paid to the solicitor in the usual

(1) 4 Drew. 702.

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way, and will relieve the married woman's estate of the charge which otherwise attaches. It seems to me, therefore, on principle, and there is no authority to the contrary, that the rest of the bill should simply be dismissed with costs.

I now come to the only other point, and that is this: The Vice-Chancellor, and again not according to his own opinion, but apparently pressed by authorities which were cited to him, directed an inquiry under these circumstances: It seems there was a partnership, in which, as I said before, Mr. *Crawford* was the senior partner, in one of these mills. It seems also that the partners of the partnership firm have become bankrupt, and Mr. *Butcher* is their trustee in bankruptcy. Mr. *Butcher* says one of these mills, or at all events the machinery in the mill, was partnership property, and formed part of the partnership assets, and that, as trustee under the bankruptcy, he is entitled to at least one-fourth part of the property by title paramount to the mortgage; and he alleges there was such possession of the frame of the mill at the time of the marriage as would give constructive notice at all events to the trustees of the settlement, and so entitle him to dispute their legal estate as far as regards that portion of the property which he claims. The Vice-Chancellor in this suit gave an inquiry to ascertain whether his claim was well founded or not. That is the substance of the inquiry that is complained of, and, it appears to me, rightly complained of.

The Plaintiff gets nothing whatever as against the Defendants Mr. and Mrs. *Crawford*, in the view I take of the case, and, as I understand it, subject to an exception which I will advert to, the view the Vice-Chanceller took of the case. That being so, his title wholly fails. What right has a Court of Justice to investigate a claim by title paramount by one co-Defendant against the other? I am not aware of any. The answer is, if you wish to assert these claims you must assert them in a proper action. But it was said, and the Vice-Chancellor acceded to that view, that whatever decision principle might call on us to make, authority was the other way. I certainly was surprised to hear it; and I was not surprised to find when the authorities were referred to that they were authorities of a totally different class. The authorities referred to were of this sort:—That where a Plaintiff obtains relief

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against one or more Defendants, and there are subordinate questions either necessary to be gone into to work out that relief completely for the benefit of the Plaintiff, or necessary to adjust the rights of the Defendants consequent on the relief so obtained by the Plaintiff, the Court may by inquiries in Chambers work out the equities between the co-Defendants. But there is no case produced in which any such inquiries were directed where the Plaintiff's case wholly failed. It appears to me, therefore, that we are not compelled, as the Vice-Chancellor thought he was compelled, to decide against principle by the authorities produced.

There is only one other point which it is necessary to advert to. The Vice-Chancellor made a declaration which appears to me, I must say, to be wholly right so far as the law of the matter is concerned: that the interest of the husband in the property in question was not defeasible in the way it purported to be by the settlement by reason of its being his own property. The objection to the declaration is this, that it is a declaration as to future rights, future contingencies, and remote interests of the husband. The rule of the Court of Chancery always was not to entertain a suit merely for that purpose. There are some instances, in which, as incidental to the relief given, it has become absolutely necessary to determine such rights, and in that way those rights are and must be determined, but no suit is entertained simply and exclusively for the purpose of deciding upon the nature and extent of future contingent rights without immediate present relief. Consequently it appears to me that that part of the decree cannot be supported, and the only results of this appeal should be to give the costs of it to the Respondents, Mr. and Mrs. *Crawford*, and to dismiss the bill against them with costs wholly, not disturbing that part of the decree which gives them a certain portion of the costs as between solicitor and client.

James, L.J.

JAMES, L.J.:—

I am of the same opinion. It appeared to me when it was admitted by Mr. *Benjamin*, as he was obliged to admit very soon after he was pressed with it, that the covenant for payment of £20,000 was a valid covenant, the whole case in fact failed; because if there was a valid covenant for £20,000, it is

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clear the trustees, who were creditors to that extent, were entitled to ask for, and entitled to receive, a mortgage for the £20,000 from their debtor; and that mortgage, being in the hands of *bonâ fide* creditors, which they were, was as good as the covenant itself. It appears to me, therefore, the case wholly fails as far as relates to the disturbance of that settlement of the mortgage which followed it.

Then that would lead necessarily, it appears to me, to the dismissal of the bill against the whole of these parties with costs. I am entirely of the same opinion as that expressed by the Master of the Rolls, that it would be sacrificing substance to the merest form to deprive this lady, or really the lady's solicitor, of the costs of resisting an unfounded suit merely because she did not go through the additional form and incur the additional expense of obtaining an order to appear and defend separately from her husband, which was all that would have been required to set it all right, the husband being simply there as her husband, and she being the party beneficially interested. The fact that they did not incur further expense in going through that unnecessary form ought not to have affected their rights at all.

Then I agree also, under whatever circumstances inquiries have been made between Defendants, this is, in my view, eminently a case in which no such inquiry could be made, because it is a claim to something paramount both to the Plaintiff and to the Defendants. The Plaintiff says you have got a bad mortgage on my property, or that which should be my property. Somebody says part of the property does not belong either to you or to me; you may fight it with that person if you like. But the person who has got the mortgage says, I will fight it whenever I am called on to fight it by the person who makes the claim against me, but I cannot have that disposed of by inquiries in Chambers before the Registrar as to my title to that property which I hold under what is apparently a perfect title under my deed. That is not a case which was contemplated to be settled by inquiries; it would be entirely a new way of disposing of such a case. The cases in which inquiries are made are cases in which *A.* gets a decree against *B.* and *C.*, and there may be doubts in what proportions they are to pay it, or cases in which *A.* gets a decree to recover

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property, and then there may be *cestuis que trust* co-Defendants, and there may be questions as between them as to what are the exact interests of the *cestuis que trust*, who have a common interest with the Plaintiff. That is the class of cases in which inquiries are directed. But it cannot be a right thing, in my view, to direct an inquiry on a totally independent and hostile right alleged by one Defendant against both the Plaintiff and the other Defendant. I agree, therefore, that that inquiry ought not to have been made.

Then with regard to the declaration: I think the Master of the Rolls is right in saying it is not the practice of the Court to make declarations as to the future contingent interests of *cestuis que trust* of property which is left simply in the possession of the trustees of the settled property.

Bramwell, L.J. BRAMWELL, L.J.:—

I am of the same opinion. I have only a word to add. I agree with the Lord Justice that when Mr. *Benjamin* admitted that the original covenant to pay £20,000 was a valid one, and would have sustained proof against the estate, there was an end of the case. I did not at first see that it was valid. But it is obvious it was so. If *Crawford* had remained solvent there can be no doubt that an action could have been maintained against him on that covenant. Then if that was a valid covenant, surely the covenant in the deed of mortgage, which you may say was given in lieu of it, was a valid covenant also. Then if the mortgage was not valid, this impossible condition of things would exist—that there would be a deed of mortgage with a valid covenant to pay the mortgage money on it, but with an invalid mortgage of property purported to be mortgaged. It would be impossible that this could be. I therefore agree with the Lords Justices.

Solicitors for Plaintiffs: *Grundy & Kershaw, Manchester*, agents for *Holder & Holder, Bolton.*

Solicitors for Defendants: *W. Parker; Addleshaw & Warburton, Manchester.*

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Ex parte CHARLTON. *In re* CHARLTON.

C. A.
1877
C. J. B.
May 7.
C. A.
July 5.

Composition—Failure to pay—"Injustice or undue Delay to Creditors"—Power of Court to adjudicate Debtor a Bankrupt—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 125, 126—*Bankruptcy Rules*, 1870, *r.* 252—*Bankruptcy Forms*, 1870, *No.* 106.

The power given to the Court by sect. 126 of the *Bankruptcy Act*, 1869, to adjudge a compounding debtor a bankrupt is a discretionary power, and is independent of the commission by him of an act of bankruptcy, and it may be exercised more than six months after the filing of the liquidation petition.

A declaration by the debtor of his inability to pay one of the instalments of the composition at the time appointed is a sufficient ground for the exercise of this power.

Whether, under such an adjudication, the title of the trustee in the bankruptcy would have any relation back, *quære*.

Decision of *Bacon*, C.J., affirmed.

Statement.

EDWARD CHARLTON, *Robert Hedley Charlton*, and *Thomas Charlton*, were colliery owners and coal-fitters at *Middlesborough*, trading as *Thomas Charlton & Co.* On the 4th of September, 1876, they filed a liquidation petition in the *Stockton-on-Tees* County Court. The first meeting of the creditors was held on the 16th of October, when the creditors resolved by the statutory majority to accept a composition of 7*s.* 6*d.* in the pound in satisfaction of their debts. The composition was to be payable in four instalments, viz., 2*s.* in the pound within three calendar months from the 30th of October; 1*s.* 6*d.* in the pound within fifteen calendar months from the same date; 1*s.* 6*d.* in the pound within twenty-four calendar months from the same date; and 2*s.* 6*d.* in the pound within thirty-six calendar months from the same date. The instalments were to be secured by the joint and several promissory notes of the debtors and of *William Charlton*, *Charlotte Charlton*, widow, and *Charlotte Charlton*, the younger, spinster.

The resolutions were confirmed at the second meeting of the creditors, held on the 30th of October, and were duly registered.

The promissory notes for the several instalments were handed to the creditors on the 24th of January, 1877, and, among others, to *J. P. Hornung*, who was a creditor for £1260 12*s.* 1*d.* The notes bore date the 30th of December, 1876, and were made payable

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respectively on the 2nd of February, 1877, the 2nd of February, 1878, the 2nd of November, 1878, and the 2nd of November, 1879. The note for the first instalment was presented for payment by *Hornung* on the 2nd of February, 1877, but was not paid by the debtors or by the sureties. On the 3rd of February the debtors wrote to *Hornung* as follows:—

Statement.

"We regret extremely to have to inform you that, owing to our inability to make financial arrangements for the payment of the first dividend under the composition, the promissory notes given to secure it have not been met. We have exhausted every effort to meet the views of the bankers, and confidently expected that the dividend would have been paid."

The debtors sent a similar letter to the other creditors. On the 6th of March, 1877, *Hornung* presented a bankruptcy petition against the debtors, alleging that they had committed an act of bankruptcy by the filing of the liquidation petition on the 4th of September, 1876. The petition stated the composition proceedings, and the failure to pay the first instalment, and submitted to the Court that for the causes above mentioned the composition had failed, and could not be proceeded with without injustice or undue delay to the creditors. The debtors disputed the act of bankruptcy, on the ground that it had been committed more than six months before the presentation of the bankruptcy petition, and was, therefore, under sect. 6 of the *Bankruptcy Act*, 1869, not available for adjudication. The Registrar, acting as Judge, held that he had power to make the adjudication under the last clause of sect. 126 of the Act, and accordingly adjudicated the debtors bankrupt. The debtors appealed to the Chief Judge. The appeal was heard on the 7th of May, 1877.

Argument.

De Gex, Q.C., and *Terrell*, for the Appellants, cited *Ex parte Duignan* (1), *Boothbey* v. *Sowden* (2).

Winslow, Q.C., and *Finlay Knight*, for the petitioning creditor, cited *Ex parte Marland* (3); *Glegg* v. *Gilbey* (4); *Ex parte Stebbing* (5).

(1) Law Rep. 6 Ch. 605.
(2) 3 Camp. 175.
(3) Law Rep. 20 Eq. 777.
(4) 2 Q. B. D. 6, 209.
(5) Law Rep. 19 Eq. 441.

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De Gex, in reply, referred to *Ex parte Fenning* (1).

BACON, C.J.:—

No doubt this case is one of considerable importance. The difficulty, such as it is, is created solely by the words of the *Bankruptcy Act*. Mr. *De Gex's* principal argument rests upon the 6th section of the Act, which enumerates a certain state of things on the happening of which a man may be adjudged a bankrupt. The words of the section are: "on any of the above grounds." But the Act having disposed of that topic embraces another resting upon totally different considerations. The 125th and 126th sections lay down a new and distinct law upon the subjects comprised within them. They provide, amongst other things, that in the cases referred to the Court may adjudicate the debtor a bankrupt. That is to say, the Court, which has seisin of the subject by the filing of the debtor's petition, the Court which knows that the debtor has committed an act of bankruptcy and must take judicial notice of that, may at any time (provided the events happen which are mentioned in these two sections, so as to render it right that the Judge should exercise the authority which he possesses) adjudicate the debtor a bankrupt. It is not that he is to be adjudged a bankrupt on any of the grounds mentioned in the 6th section, but because events have happened which make it impossible that the composition should be proceeded with in justice to the creditors. The 12th clause of section 125, and the last clause of section 126, are, almost in words, certainly in effect, the same. I read these clauses as a distinct Act of Parliament, and I consider that the 6th section has no application to this particular case. The six months there limited are limited only with regard to an adjudication on any of the grounds before mentioned in that section, but there are other grounds upon which by the same statute, under a different chapter I may say, namely, that relating to liquidation and composition, the Court is armed with the power of adjudicating a man a bankrupt. Then comes the question whether the power has been properly exercised in this case, whether or not there was "sufficient cause." The allegations in the petition I take to be of no very binding effect, and of no

(1) 3 Ch. D. 455.

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very great importance, although they are perfectly true. It is perfectly true that within six months and a few days an act of bankruptcy had been committed; but the fact that the liquidation petition had been filed the Court knew of itself, and must have known, because the receiving and filing of the petition is the act of the Court, a judicial act. If the attempt to make the debtors bankrupt rested solely on the 6th section no doubt the law is perfectly distinct that, six months having elapsed since the commission of the act of bankruptcy, they cannot be adjudicated bankrupt. But, having confessed to the Court that they are indebted to the now petitioning creditor in the full amount mentioned in their statement of affairs, and that they were unable to pay their debts, I think the Court had knowledge of an act of bankruptcy committed upon which it could with the utmost propriety adjudge them bankrupt, because the proceedings must be taken to have been going on in Court from the very filing of the petition. There is no interval in which it could be said that the Court had not full seisin of and jurisdiction over these insolvents who were not yet bankrupts. That being so, and that being the interpretation which I put on these several chapters in the Act, I think the Court has power at any time to exercise the authority which the section confers, and having accepted the offer of the debtors that they would surrender themselves and their affairs to be liquidated by arrangement, the power of the Court to adjudge them bankrupt under the 125th and 126th sections was in full vigour, and was *ex debito justitiæ* to be exercised if a proper case was presented. That brings me to the other point which was argued, that the composition having been accepted by the creditors there is accord and satisfaction of the debts. Now I think that cannot be maintained. *Boothbey* v. *Sowden* (1) must have been a case where the composition had been paid or tendered. To sustain a plea of accord and satisfaction to an action brought by a creditor, you must prove that there has been satisfaction as well as accord. The giving of a promissory note which is dishonoured when it becomes due is no satisfaction; you must prove that the satisfaction has been duly executed. The common law upon that subject is plain, clear, and beyond doubt, and

(1) 3 Camp. 175.

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numerous authorities have established it. Now, what are the facts here? The promissory notes for the several instalments were handed over in performance of the condition upon which the composition was agreed upon, and when the first set of them became due the creditors receive a cool letter from the debtors saying it is not convenient or competent to them to satisfy that condition. Is the composition anything but an agreement that if a certain condition be complied with then there shall be a discharge? I apprehend that common sense, common construction, and settled law alike require that, if the condition, which is a part of the satisfaction, is not fulfilled, there is an end of the agreement, and from that moment the creditor is remitted to his original rights. He may sue at law, and if he could sue at law, it being, as I conceive, indisputable that under a plea of accord and satisfaction there would be no answer to the demand, what reason can be suggested why a man, being remitted to his common law right, is not also entitled under this statute to avail himself of the power which the Legislature has given to the Court if it ascertains that for any sufficient cause the composition, the arrangement, cannot proceed without injustice or undue delay to the creditors? Can anything be more plainly unjust than that creditors should be fobbed off with promissory notes which are good for nothing, if one may judge of the rest by the one which has already become due? Can I doubt that, unless the most undue delay is to be inflicted upon the creditors, it is necessary that the affairs of these debtors should be administered in bankruptcy? Being therefore of opinion, as I am, that the 6th section of the Act is not applicable to this case, but that section 126 is applicable, I find as an unquestionable fact that this composition cannot proceed without injustice. The injustice is that the expectations of the creditors are not fulfilled; that the creditors, believing they had security, find they have none; that delay must ensue, whether they are put to serve a new debtor's summons or otherwise; and that is the alternative upon which Mr. *De Gex* so much relied. He said that the creditors could not proceed upon the old act of bankruptcy, but that they might serve a new debtor's summons. But would not that be causing undue delay, and is it not plain that the 125th and 126th sections mean to give the Court a power to

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act upon the original petition (the fact being proved that the events have happened in which the Court has power to act upon it), and then, in the very words of the statute, to adjudge the debtor a bankrupt?

Judgment, C. J. B.

The one argument which I thought of more weight than any other throughout this case was that founded on the difference between liquidation and composition. Liquidation takes the estate out of the power of the debtor; composition leaves it in his power. But it leaves it in his power only upon certain conditions. The petition for arrangement is a matter of notoriety; it is notice to all the world, at least to all the creditors. The proceedings under it must be taken to be known by everybody. A notorious insolvent who has obtained his discharge upon a condition which he has not performed, is, in my opinion, in no condition to sell his property. Whatever conveyancers may say about it, I think any man who dealt with him knowing that he was not his own master, or the master of his own estate, until he had fulfilled the conditions imposed upon him, would have only himself to blame. No facts are alleged to give me any reason to suppose that any such danger will arise in this case. But holding, as I do, that in plain law there has been no accord and satisfaction, and therefore that the original rights of the creditors are still possessed by them, and finding that, amongst other rights, the statute has conferred upon them the right to obtain from the Court an order of adjudication, if in the opinion of the Court there shall be sufficient cause, and holding that the injustice to the creditors, and the undue delay to which they are exposed, are good reasons for adjudicating these debtors bankrupt; in my opinion the adjudication cannot be disturbed. The appeal must be dismissed, but, as the Appellants are bankrupts, the costs will be limited to the amount of the deposit.

C. A.

From this decision the bankrupts appealed. The appeal was heard on the 5th of July, 1877.

Argument.

De Gex, Q.C., and *Terrell*, for the Appellants:—

The policy of the recent bankruptcy statutes has been to reduce the time within which a petition for adjudication can be presented

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after the commission of an act of bankruptcy; the limit is now fixed at six months: *Bankruptcy Act*, 1869, s. 6 (1).

If this decision is right, an adjudication may be made at any time after the filing of the liquidation petition, which is an act of bankruptcy, and the title of the trustee may relate back for any time, irrespective of the limit of twelve months mentioned in sect. 11. How can there be an adjudication of bankruptcy without an act of bankruptcy? Sects. 125 and 126 do not say that proceedings for liquidation or composition are to be commenced by the filing of a petition; that provision is made by rule 252, and the object was to compel the debtor to commit an act of bankruptcy by declaring his inability to pay his debts, and in a liquidation the title of the trustee relates back to the filing of the petition: *Ex parte Duignan* (2). The object of a composition is to leave the debtor in possession of his property, so that he may by means of it pay the composition. If the decision is right, no one could safely deal with a compounding debtor without proof that the composition had been duly paid to all the creditors. This uncertainty might continue for years.

[JAMES, L.J.:—You admit that it must continue for six months.]

(1) Sect. 6 (after defining what are acts of bankruptcy), provides that, "No person shall be adjudged a bankrupt on any of the above grounds unless the act of bankruptcy on which the adjudication is grounded has occurred within six months before the presentation of the petition for adjudication."

Sect. 11: "The bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the act of bankruptcy being completed on which the order is made adjudging him to be bankrupt; or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to and to commence at the time of the first of the acts of bankruptcy that may be proved to have been committed by the bankrupt within twelve months next preceding the order of adjudication; but the bankruptcy shall not relate to any prior act of bankruptcy, unless it be that at the time of committing such prior act the bankrupt was indebted to some creditor or creditors in a sum or sums sufficient to support a petition in bankruptcy, and unless such debt or debts are still remaining due at the time of the adjudication."

Sect. 126 provides, by the last clause, that, "If it appear to the Court, on satisfactory evidence, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the Court may adjudge the debtor a bankrupt, and proceedings may be had accordingly."

(2) Law Rep. 6 Ch. 605.

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The protection clauses of the Act, sects. 94, 95, speak of notice of an act of bankruptcy "available for adjudication," which must mean an act committed within six months. The result of this decision is that an act of bankruptcy is available for adjudication at any time after its commission. An indefinite relation back of the trustee's title would produce great inconvenience.

[JAMES, L.J.:—It would be a relation back, not at the will of the creditors, but at the discretion of the Court, which would not exercise its power if it saw that any injustice would be produced.]

The creditors have another remedy; they can, by means of a debtor's summons, compel the debtor to commit a new act of bankruptcy, and then proceed in the ordinary way. This would be a much more convenient course than proceeding in a way which may carry back the title of the trustee indefinitely.

[JAMES, L.J.:—Is there when this power is exercised any relation back of the trustee's title? The bankruptcy begins with the finding of the Court that the composition cannot proceed without injustice or undue delay.]

If that were so a fraudulent preference could not be avoided. This power was not intended to be exercised in a case like the present. The creditors have ample remedies for mere non-payment of the composition; they can sue the sureties, or they can sue the debtors for their original debts. This power of adjudication was meant to meet a case where a dissentient creditor for a large amount, who was not bound by the composition by reason of his debt not having been properly inserted in the debtor's statement of affairs, was tearing the estate to pieces.

The petitioning creditor is not, at any rate, entitled to maintain the adjudication and also to keep the promissory notes of the sureties: *Latter* v. *White* (1). He has not offered to give up his promissory notes; there is nothing to shew that he has not negotiated them. Indeed, it may well be contended that there is an accord and satisfaction, that the creditors have accepted the composition in satisfaction of the debts independently of its payment in due course. They have obtained the additional security of

(1) Law Rep. 6 Q. B. 474.

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Argument.

the sureties: *Henderson* v. *Stobart* (1); *Steinman* v. *Magnus* (2). Moreover, the words of sect. 126 are "injustice or undue delay to the creditors," meaning all the creditors. The Court, if it sets aside the composition, must do so *in toto;* it ought not to act upon the application of a single creditor; all the creditors ought to have notice, and are entitled to be heard on the question. The petition for adjudication was served on the debtors only.

[BAGGALLAY, L.J.:—Was there not a general failure to pay the composition?

Winslow, Q.C., for the petitioning creditor:—Notice was given to all the creditors that the debtors were unable to pay.]

At any rate the Court has a discretion; there is no absolute right to an adjudication on proof of the statutory requisites as there is in an ordinary case. There must be "satisfactory evidence." The theory of the liquidation and composition clauses is that in matters of discretion the majority of the creditors are to decide.

Winslow, Q.C., and *Finlay Knight*, for the petitioning creditor:—

[JAMES, L.J.:—Is there not a difficulty by reason of the promissory notes being outstanding?]

They are still in the Petitioner's possession, and he has at the instance of the sureties been restrained from parting with them.

[They were stopped by the Court.]

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am of opinion that the construction of this Act of Parliament is reasonably plain. The Legislature, whether wisely or not it is not necessary to inquire, have made provision for enabling a debtor to effect a composition with his creditors. Then, foreseeing that injustice might possibly be done to the creditors, and foreseeing that difficulties might arise in carrying out the composition, they have provided in express terms that, if the facts mentioned in the last clause of sect. 126 can be made to appear to the Court, the Court may adjudge the debtor a bankrupt. It is not that the

(1) 5 Ex. 99. (2) 2 Camp. 124.

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Court is to have power to adjudge him a bankrupt upon an act of bankruptcy in another bankruptcy proceeding—the Court always has that power—but it is that the Court shall have power in effect to convert the proceedings in the composition into a bankruptcy, and to enforce the rights of the parties to the composition by means of proceedings in bankruptcy, if it appears that in consequence of legal difficulties or from any sufficient cause the composition cannot proceed without injustice or undue delay to the creditors.

It appears to me that if ever there was a case coming within the true intent and meaning of that clause, it is the present case. Here are gentlemen who obtain their creditors' assent to a composition of 7*s.* 6*d.* in the pound, payable in four instalments, extending over three years altogether, and when the very first instalment becomes due, the debtors say to their creditors, "We cannot go on with the arrangement; we cannot make financial arrangements." If the creditor had obtained payment from the sureties he would have been satisfied, but the sureties did not pay. The debtors do not pay, and the sureties do not pay, and we are asked now to hold that this is not a proper case for the Court to say to the debtors, "Well, if that is so, you must become bankrupts, and proper proceedings in bankruptcy shall take place." What the consequences of that may be, with regard either to the promissory notes or to any other transactions, it is not for us now to say. All we can say is that the order is within the plain words of the Act.

Baggallay, L.J. BAGGALLAY, L.J.:—

I am of the same opinion. Sect. 6 provides for an adjudication based upon the commission of an act of bankruptcy, and that is an adjudication to which the petitioning creditor is of right entitled on proof of the statutory requisites. There is no discretion given to the Court whether it will adjudge the debtor a bankrupt or not. Sections 125 and 126 provide, as it appears to me, for an adjudication not necessarily based upon an act of bankruptcy, but which may be based upon other circumstances. And those other circumstances are pointed out in the two sections in words not very dissimilar and which have substantially the same meaning. There

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may be an adjudication if the Court is satisfied that, in consequence of legal difficulties or from any sufficient cause, the composition, or liquidation, cannot proceed without injustice or undue delay to the creditors: in that case the Court may proceed to adjudicate the debtor a bankrupt. That is a case in which a discretion is given to the Court whether it will or will not adjudicate. It has been urged that no such adjudication can be made under either of those sections unless an act of bankruptcy has been committed by the debtor within the six months preceding the date of the adjudication, and reliance has been placed upon the 6th section for that purpose. If, however, there had been an act of bankruptcy committed within the period of six months, then it would have been the right of the petitioning creditor to demand the adjudication; it would not have been a matter for the discretion of the Court, as is clearly intended by both sects. 125 and 126.

Judgment, C. A. Baggallay, L.J.

I may observe also, as regards sect. 6, upon which Mr. *De Gex* has much relied, that the words of it are adverse to his contention, for this reason:—The words are not, "No person shall be adjudged a bankrupt" unless the act of bankruptcy has been committed within six months, but "No person shall be adjudged a bankrupt on any of the above grounds." That is to say, no person shall be adjudged a bankrupt on the ground of his having committed an act of bankruptcy, unless the act of bankruptcy upon which the adjudication is grounded has occurred within six months. If it had been intended that in no case should there be an adjudication unless an act of bankruptcy had been committed within six months, the words "on any of the above grounds" would have been omitted. It appears to me that the introduction of those words clearly shews that that limit was intended to apply only to the particular class of cases referred to in the 6th section, cases where an act of bankruptcy has been committed.

COTTON, L.J.:—

Cotton, L.J.

I am of the same opinion. A distinction must be drawn between proceedings under sect. 6 and proceedings under sect. 126. I quite agree that if any creditor takes proceedings under sect. 6 against a debtor who has not submitted himself to any other section of the Act under which he is or could be adjudicated a bankrupt,

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Judgment, C. A. Cotton, L.J.

the petition must be founded upon an act of bankruptcy committed within six months, and that if any creditor not bound by the composition seeks to make the debtor a bankrupt, and for this purpose relies on the petition which the Bankruptcy Rules require to initiate proceedings in liquidation or composition as an act of bankruptcy available for adjudication, he must do so within six months. But the case is entirely different under sect. 126. As I read that section, any debtor who takes the benefit of it submits himself at once of necessity to the powers given by it to the Court of Bankruptcy. There are two powers which are material. One is that the Court shall be able to enforce by motion in a summary way the carrying out of the composition. But it may not be able to do this effectually, and then the section, without requiring any act of bankruptcy (for it is to be noted that the Act of Parliament itself does not require a petition to be filed admitting that the debtor cannot pay his debts), authorizes the Judge, if he thinks it necessary in order to do justice between the parties, the debtor and his creditors, to adjudge him a bankrupt, and then "proceedings may be had accordingly," that is, all those proceedings which in the ordinary course of a bankruptcy follow an adjudication shall take place, and the man's property shall be dealt with as if he were a bankrupt.

I think, therefore, that the order appealed from was right.

Solicitor for Appellants: *H. W. Chatterton.*

Solicitors for Respondent: *Sharp & Ullithorne*, agents for *Belk & Parrington, Middlesborough.*

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Ex parte RYLANDS. *In re* CHESTERS.

C. A.
1877
C. J. B.
March 5;
April 30.
C. A.
July 5.

Liquidation—Receiver—Power of Creditors to appoint—Substitution of Nominee of Creditors for Receiver appointed by Court—Bankruptcy Rules, 1870, *rr.* 260, 262.

The power of appointing a receiver given to the creditors by the first part of rule 262 of the Bankruptcy Rules, 1870, can only be exercised when no receiver has been appointed by the Court.

The latter clause of the rule means that the nominee of the creditors, after they have acquired the status of creditors by proving their debts at the first meeting, shall be substituted for the receiver previously appointed by the Court, the object being to provide for the possibility of the creditors at the first meeting not being able to agree upon a trustee, and adjourning the meeting for the further consideration of his appointment.

Decision of *Bacon*, C.J., affirmed.

Statement.

ON the 19th of January, 1877, *Thomas Chesters*, a draper at *Liverpool*, filed a liquidation petition in the *Liverpool* County Court, and on the 20th of January, upon the application of the debtor, *H. Bolland*, an accountant at *Liverpool*, was appointed by the Court receiver of the debtor's property, and the same day, on his application, an order was made restraining the proceedings in an action against the debtor, which had been commenced by a creditor named *Windsor*, *Bolland* giving the usual undertaking as to damages.

The debtor stated in his petition the estimated amount of the debts owing by him to be £913. On the 23rd of January a majority in value of the persons mentioned in the list of creditors delivered to the Registrar on the filing of the petition, signed a nomination paper, in the form No. 113 of the Bankruptcy Forms of 1870, nominating and appointing *Samuel Hunt*, an accountant at *Manchester*, to be receiver of the debtor's property, and on the same day application was made to the Court under rule 262 to substitute *Hunt* in the place of *Bolland* as receiver. The Judge refused the application. The nominating creditors appealed to the Chief Judge.

The appeal came on to be heard on the 5th of March, 1877. No first meeting of the creditors had been held, and the creditors had not proved their debts.

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De Gex, Q.C., and *Bagley*, for the Appellants:—

The last clause of rule 262 of the Bankruptcy Rules, 1870 (1), is imperative.

The creditors in this instance are quite ready to indemnify Mr. *Bolland* against any risk he may have incurred.

Finlay Knight, for *Windsor*.

Crump, for *Bolland*, was not called upon.

Judgment, C. J. B.

BACON, C.J.:—

The creditors may make a fresh application to the learned Judge, shewing him that they are ready to indemnify the receiver appointed by the Court. The Court will not leave a receiver appointed by itself to bear the brunt of any proceedings that may be taken against him in that character. It has been stated that one of the appealing creditors is the creditor who has been restrained. I am not about to decide the case upon any such ground as that. It would be introducing a most mischievous practice. If you desire to remove a receiver whom the Court has appointed,

(1) Rule 262 provides that "A trader shall state in his petition the estimated amount of the debts owing by him to his creditors, and where no receiver or manager has been appointed by the Court, a majority in value of such creditors may at any time prior to the passing of the special or extraordinary resolution, as the case may be, nominate and appoint a receiver or manager of the trade effects or business of the debtor, or any part thereof, according to the form in the schedule. Where any such receiver or manager has been so appointed, he shall investigate the state of the debtor's affairs, and report thereon to the general meeting of creditors. The nomination and appointment of any such receiver shall be confirmed by the Court upon summary application in any case in which the debtor refuses to give possession or control to the receiver or manager so appointed. Any such nomination paper shall be in duplicate, and may be signed by the creditors in their individual or partnership names, or by some person who shall state in his signature that he does so by procuration on the creditor's behalf. The signatures or debts need not be verified further than by the affidavit of one of the three principal creditors signing the nomination paper (or a partner in the firm of one of them) according to the form in the schedule, and such affidavit shall be filed in Court with one of the nomination papers. If any receiver or manager has been appointed by the Court, the nominee of the creditors shall be forthwith substituted in his place, and the Court shall order accordingly."

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you must shew, first, that it is a right thing to do, and, secondly, you must satisfy the Court that the receiver will be indemnified. The matter must be submitted again to the learned Judge. If the contention of the Appellants is to prevail, the mere will of the creditors is imperative. The matter has not been properly brought before the learned Judge. He will have to consider the terms by which it is proposed that the creditors shall be bound, and any other point of law that may arise.

Judgment, C. J. B.

The order will be that the operation of the order of the County Court be suspended, with liberty to the creditors to make such application to the County Court as they may be advised for the appointment of a new receiver upon proper terms.

Statement.

An application having been accordingly again made to the County Court Judge, and having been again refused by him, the creditors appealed to the Chief Judge from the further order. The appeal was heard on the 30th of April.

Argument.

De Gex, Q.C., and *Finlay Knight*, for the Appellants:—

We rely on the terms of the 262nd rule.

BACON, C.J., asked whether the creditors had appointed a trustee.

De Gex:—There has been no first meeting. After the appointment of a trustee there can be no receiver.

Crump, for *Bolland*.

Judgment, C. J. B.

BACON, C.J.:—

If there be a trustee, and he should apply to the Court for the appointment of a receiver, the Court has power to appoint one. But until a first meeting of creditors has been held, there is no status of creditors. It is only from the first meeting that their power of voting begins. Their first step ought to have been to appoint a trustee, and he would at once have superseded the receiver appointed by the Court.

The Court, having full jurisdiction to appoint a receiver, does

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so. Then certain persons come to the learned Judge and say, "We are creditors." He says to them, "How do I know you are creditors?" The proceedings have been wholly irregular; and I consider that there has been a great abuse of the practice of the Court in this instance. My impression is that the creditors have grossly neglected their plain duties.

What seems to have weighed with the learned Judge was, that in a very small bankruptcy he was asked to substitute for a receiver on the spot, another person living some thirty or forty miles off.

I decline to interfere with the order, which seems to me to have been perfectly right.

C. A.

From this decision the creditors who had nominated *Hunt* appealed. The appeal was heard on the 5th of July.

Argument.

De Gex, Q.C., and *Finlay Knight*, for the Appellants:—

It has not hitherto been the practice in the *Liverpool* County Court to make such a substitution as we ask for, but the language of rule 262 is express. We are willing to indemnify Mr. *Bolland*.

[They were stopped by the Court.]

Crump, for *Bolland*:—

The creditors might, if they had chosen, have appointed a trustee before this, who would have superseded the receiver. The Judge of the County Court held that the power of substitution given by rule 262 is only discretionary, and that the Court is not bound to act upon it. The latter clause of the rule must refer to creditors who have been ascertained to be such by proving their debts at the first meeting, and the power given to them is a power to nominate a receiver, who must then be substituted by the Court for the receiver previously appointed by itself.

De Gex, in reply:—

That cannot be the meaning of the last clause of the rule, because the trustee is appointed at the first meeting, and then there is no occasion for a receiver The question is whether, for

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the period between the filing of the petition and the appointment of the trustee, the debtor or the creditors shall have the power to appoint the receiver. The object of the rule is that the creditors may appoint a person who shall make an independent investigation of the debtor's affairs, and report to the creditors at the first meeting, so that they may be better able to determine what course to adopt.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am of opinion that the order of the Chief Judge must be affirmed. I quite agree with Mr. *De Gex* that the scope of the present *Bankruptcy Act* is to enable creditors to have the management of their own affairs. The course of proceedings in the case of a petition for liquidation is distinctly laid down in the 262nd rule. That rule provides that "where no receiver or manager has been appointed by the Court, a majority in value of such creditors may at any time prior to the passing of the special or extraordinary resolution, as the case may be, nominate and appoint a receiver or manager." That is a provisional appointment, and, all this being simply provisional, it remains a provisional appointment until something can be finally settled and determined at the meeting of the creditors at which the trustee is to be appointed, and in the ordinary course of things the appointment of receiver will only last until the first meeting of the creditors, at which ordinarily a trustee is appointed, and his appointment entirely puts an end to the office of the receiver. But it is quite possible, or at all events it is not impossible, that the persons who are present at the first meeting may not agree as to the appointment of a trustee; there may be some question, and they may possibly adjourn the meeting for further information and discussion before they agree finally on the appointment of a trustee. If the creditors at that meeting—who are the real creditors, the ascertained creditors, the creditors coming to exercise their rights as creditors—if the creditors at that meeting should be minded to appoint a receiver instead of appointing a trustee, then the creditors may nominate a person as receiver, and in that event the person so nominated by the creditors, who have been ascertained as such by proving their debts, shall be forthwith substituted by the Court in place

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of the interim receiver and manager previously appointed by the Court. That seems to me to be the meaning of the rule, because the first words of it clearly apply only to cases where no receiver has been appointed by the Court. There the last words are, "If any receiver or manager has been appointed by the Court the nominee of the creditors shall be forthwith substituted in his place." That is, the nominee, not of the creditors who are named in the schedule to the debtor's statement of affairs, but of the persons whom the Court can ascertain to be the real creditors, the nominee of those creditors who, as Mr. *De Gex* truly says, are the persons to whom the Legislature has given the conduct and management of the debtor's affairs.

Baggallay, L.J. BAGGALLAY, L.J.:—

I am of the same opinion. It appears to me that this is the only way in which effect can be given to the whole of the 262nd rule consistently with the obvious intention of the Act of Parliament.

Cotton, L.J. COTTON, L.J.:—

I also am of the same opinion. *Primâ facie*, persons who have not proved their debts are not creditors. But the 262nd rule provides that, in the event of no receiver being appointed by the Court, the power to appoint one shall be given to those persons who have not proved their debts, a power which they would otherwise not have. The last clause of the rule goes on to say that where there has been no appointment of a receiver by the creditors under the previous part of the rule, but the Court has thought fit to appoint a receiver, the creditors who have established their right and their power of intervening by proving their debts may nominate some one as receiver—not appoint him, but nominate him—and then they may go to the Court and ask that their nominee may be substituted for the receiver appointed by the Court. But the appointment must still be made by the Court, and the nominee so appointed must be the nominee of the creditors who have proved their debts. In the present case the person who was nominated by the creditors was not nominated by the creditors who had proved their debts.

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BAGGALLAY, L.J.:—

I should have noticed also the negative words in the rule, viz., "where no receiver and manager has been appointed by the Court." In this case there was a receiver appointed by the Court prior to the nomination by the creditors.

The appeal was dismissed with costs.

Solicitors for Appellant: *Field, Roscoe, & Co.*, agents for *Atkinson, Saunders, & Co., Manchester.*

Solicitor for Respondent: *T. S. Smith, Liverpool.*

Ex parte HILL. *In re* ROBERTS.

C. A.
1877
July 6.

Bankruptcy—Preferential Debt—Rent—Distress—Money due to Gas Company for Gas supplied—"Landlord or other Person to whom Rent is due"—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 13, 34—*Bankruptcy Rules*, 1870, *r.* 260.

The special Act of a gas company empowered them to levy by distress all sums of money due to them for the supply of gas, the amount of which should not be disputed, and provided that any justice, on application, might inquire into and ascertain the amount due, and issue his warrant accordingly for levying the same. By sect. 16 of the *Gasworks Clauses Act*, 1847 (incorporated with the special Act), money due to a gas company for gas supplied is spoken of as "rent." The company, after one of their customers had filed a liquidation petition, and with notice of the petition, proceeded to seize his goods under a distress warrant granted by the justices in respect of money due for gas supplied to him within a year before the filing of the petition:—

Held, the company did not come within the words "landlord or other person to whom any rent is due from the bankrupt" in sect. 34 of the *Bankruptcy Act*, 1869, but that the distress was a legal process against the estate of the debtor in respect of a provable debt, which the Court had, under sect. 13 of the Act, or under rule 260 of the Bankruptcy Rules, 1870, power to restrain.

A perpetual injunction was accordingly granted to restrain the company from enforcing the distress.

Ex parte Birmingham and Staffordshire Gaslight Company (1) distinguished.

The words "other person to whom any rent is due" in sect. 34 apply to a case where rent is payable in respect of a tenancy, though the person entitled to the rent is not in popular language a "landlord."

Statement.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, sitting as Chief Judge in Bankruptcy.

(1) Law Rep. 11 Eq. 615.

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C. A. 1877 — *Ex parte* HILL. *In re* ROBERTS. — Statement.

Charles Digby Roberts, a metal worker at *Coventry*, filed a liquidation petition on the 23rd of March, 1877, in the *Coventry* County Court, and a receiver of his property was appointed. The first meeting of the creditors was held on the 11th of April, when a liquidation by arrangement was resolved upon; Mr. *A. J. Hill* was appointed trustee; and it was resolved to transfer the proceedings to the *London* Court.

On the 9th of March, 1877, the *Coventry Gas Company* obtained from the justices of the peace for the county of *Warwick* a summons against the debtor for the sum of £10 3*s.* 4*d.* due from him for gas supplied by the company to his private dwelling-house at *Stoke*, near *Coventry*, and hire of meter. On the 24th of March notice of the filing of the petition was given to the company. On the 27th of March the company obtained from the same justices another summons against the debtor for another sum of £4 6*s.* 3*d.* also due from him for gas supplied to his dwelling-house and hire of meter, and on the 29th of March the justices granted warrants of distress for the recovery of these two sums. On the 26th of March the company obtained from the justices of the peace for the city of *Coventry* a summons against the debtor for £45 12*s.* 3*d.* due from him for gas supplied to his manufactory and hire of meter, and on the 28th of March the justices granted a warrant of distress for the recovery of that sum. All these sums had become due within a year before the filing of the petition. Under these warrants the police seized some of the debtor's goods, and, upon the application of the receiver, interim injunctions were granted by the County Court, restraining further proceedings under the warrants. An injunction was afterwards granted by the *London* Bankruptcy Court until the 4th of May. The trustee afterwards applied to the Court to make the injunction perpetual. The Registrar, on the 14th of May, refused the application, and the trustee appealed.

The company was incorporated by the *Coventry Gas Act*, 1856. By sect. 2 of that Act it was provided that the *Companies Clauses Consolidation Act*, 1845, the *Lands Clauses Consolidation Act*, 1845, and the *Gasworks Clauses Act*, 1847, should be incorporated with and form part of the special Act. Sect. 48 spoke of the sum payable to the company for the hire of a meter supplied by them

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as "rent." And by sect. 56 "All sums of money due to the company for the supply of gas, or for the price, hire, or fixing of meters or fittings, and all damages, costs, and expenses by this Act, or any Act incorporated herewith directed to be paid, and the amount of which shall not be disputed, may, together with the costs of cutting off the gas, be levied by distress; and any justice, on application, may inquire into and ascertain the amount due and issue his warrant accordingly for levying the same."

Argument.

J. G. Laing, for the Appellant:—

In order to support their claim the company are bound to shew that they are within the protection given to a "landlord or other person to whom any rent is due" from the debtor by sect. 34 of the *Bankruptcy Act*, 1869, or that they are secured creditors within sect. 12. Sect. 56 of the special Act does not put them in the position of a landlord. The Registrar thought that the case was governed by *Ex parte Birmingham and Staffordshire Gaslight Company* (1). But there the company's special Act gave them power to recover their gas rent "by the same means as landlords are by law empowered to recover rent in arrear," that is, without any legal process. In the present case the company are compelled to resort to a legal process, and, therefore, sect. 13 of the *Bankruptcy Act*, or rule 260 of the Bankruptcy Rules, 1870, enables the Court to restrain them. In *Ex parte Birmingham Gaslight and Coke Company* (2), where the company's special Act contained a clause very similar to that in the present case, the Chief Judge decided that the company were entitled to enforce a distress, but that was a case of composition; and, moreover, the seizure had been made before the filing of the petition. Here the title of the trustee relates back to the filing of the petition, and may relate to a prior act of bankruptcy: *Ex parte Duignan* (3); *Ex parte Eyles* (4); *Ex parte Schulte* (5). Therefore the seizure made was of the trustee's goods. The company are in no better position than if the debtor had given them a power of distress. An ordinary power of distress is very different from a landlord's right to

(1) Law Rep. 11 Eq. 615.
(2) Ibid. 204.
(3) Law Rep. 6 Ch. 605.
(4) Ibid. 16 Eq. 99.
(5) Law Rep. 9 Ch. 409, 412.

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distrain; a power of distress in a mortgage deed is well known to be inferior to an attornment by the mortgagor: *Freeman* v. *Edwards* (1); *Jolly* v. *Arbuthnot* (2). If the company claim to be secured creditors, the answer to the claim is that the security was not completed by actual seizure till after the filing of the petition: *Ex parte Williams* (3).

Winslow, Q.C., and *English Harrison*, for the company:—

Sect. 34 applies to all "rent." The money due to a gas company for gas supplied is in sect. 16 of the *Gasworks Clauses Act*, 1847 (10 & 11 Vict. c. 15), called "rent." Sect. 34 of the *Bankruptcy Act* does not confer a new right, but only cuts down a previously existing right. Sect. 138 of the *Lands Clauses Act*, 1845, and sect. 150 of the *Companies Clauses Act*, 1845, shew the nature of the right of distress conferred on us. We may distrain on any goods of the debtor to which the warrant of the justices would extend. The distress is not a legal process within sect. 13 of the *Bankruptcy Act*, or within rule 260: *Rex* v. *Crisp* (4). It is not even necessary, under sect. 56 of the special Act, to apply to the justices unless the amount is disputed. The company could distrain of their own authority as a landlord can. The case is substantially undistinguishable from *Ex parte Birmingham and Staffordshire Gaslight Company* (5).

Judgment, James, L.J. —

JAMES, L.J.:—

I am of opinion that the order applied for in this case ought to have been made. The 34th section of the *Bankruptcy Act* is intended to preserve, with a certain limitation, the common law right of a landlord or any other person who had a right analogous to that of a landlord's right of distress. The landlord, who had the remedy of going upon the demised property and seizing the crops or goods that were there, was still to retain that right notwithstanding the bankruptcy, and then the words are added, "or other person to whom any rent is due from the bankrupt." It

(1) 2 Ex. 732.
(2) 4 De G. & J. 224.
(3) Law Rep. 7 Ch. 314.
(4) 1 B. & A. 282.
(5) Law Rep. 11 Eq. 615.

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really seems to me impossible upon any fair construction to say that a gas company selling its gas—for that is what it really does—to a private consumer who takes it at his own pleasure for so many shillings per 1000 cubic feet—for that is the nature of the bargain between them—is an "other person to whom rent is due" within the meaning of this section. It is impossible, I think, to suppose that such a company, under the power of distress given by sect. 56 of this special Act, would have any right like a landlord's common law right, any right in themselves of their own authority, to enter and seize any goods belonging to the gas consumer anywhere that they could lay their hands upon them, or that, if they had the common law right to seize the goods or effects of the consumer, that right would not be limited, as it is in the case of a landlord, to goods or effects found upon the demised property. If there were not such a limit it would be in fact equivalent to saying that a gas company, or any other similar company having similar powers, should have the right of their own authority to seize the goods or effects of the consumer anywhere throughout the whole realm. That cannot be the meaning of the power conferred by the special Act. In truth, the Act of Parliament has provided a remedy totally inconsistent with the notion of the company's having authority of their own motion, without any legal process, to seize the goods or effects of their customers. The Act has provided that they shall obtain what in truth is an execution by way of legal process. In substance, the effect of an order of the magistrates, authorizing the gas company to seize the goods and chattels of their debtor for the amount due, is, except in words, exactly the same thing as an order or judgment of the County Court Judge would be if they had sued in the County Court and obtained a judgment to be enforced by the bailiff of the County Court. It seems to me to come entirely within sect. 13 and not within sect. 34 of the *Bankruptcy Act*, and, therefore, as the company had not enforced their execution upon the goods of the debtor before the act of bankruptcy occurred, that is to say, before the presentation of the petition, the goods were the goods of the trustee in the liquidation, and the order asked for ought to have been made. Therefore the judgment of the Registrar will be reversed.

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Judgment, Baggallay, L.J.

BAGGALLAY, L.J.:—

I am of the same opinion. The Registrar, in refusing to make the injunction perpetual, has proceeded on the assumption that the case came within the 34th section of the *Bankruptcy Act*, and that he was of that opinion is apparent by his referring to the decision in *Ex parte Birmingham and Staffordshire Gaslight Company* (1). In that case, however, the gas company were authorized to recover the rent and charges due for gas "by the same means as landlords are by law empowered to recover rent in arrear." Upon those words it was that the Chief Judge held that that particular case came within the operation of the 34th section. Mr. *Winslow* admitted that unless this gas company are in the position of a "landlord or other person to whom rent is due" he could not support the order that has been made. It seems to me impossible to hold that the company were persons to whom rent was due. There is no doubt that by virtue of the *Gasworks Clauses Act*, 1847, and their special Act, they have the power of recovering rent or rates that may be due to them for gas supplied by distress in the manner pointed out by the general Act and the 56th section of the special Act, but this is only a mode of proceeding for the purpose of obtaining the amount due to them. That appears still more clearly from the provisions made by sect. 16 of the general Act, in which a distinction is drawn between amounts above and below £20. A sum less than £20 may be recovered by distress, but any sum above £20 is to be recovered by action in any Court of competent jurisdiction. The distress appears to me to be simply and solely in the nature of a proceeding for the purpose of enforcing the payment of a debt due, and to fall therefore within the 13th section and not within the 34th section of the *Bankruptcy Act*. Consequently the view taken by the Registrar is not the correct one.

Cotton, L.J.

COTTON, L.J.:—

I am of the same opinion. The only real question is whether or not the gas company is an "other person to whom rent is due" within the meaning of sect. 34 of the *Bankruptcy Act*. I think the

(1) Law Rep. 11 Eq. 615.

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real reason for inserting those words was this—to prevent any difficulty arising in a case where there was a person entitled to rent, who was yet not strictly a landlord, to provide for such cases as that of a receiver appointed under a mortgagee's receivership deed, which arose in *Jolly* v. *Arbuthnot* (1). If there was any one to whom rent was payable by a tenant it was intended that he should be able to distrain for it, although he was not in the ordinary sense a landlord. I am of opinion that a gas company is not a landlord, and that gas rent is not rent within the meaning of that section. That section refers only to people standing in the position of landlords, "rent" being only rent payable by a person standing to another in the relation of tenant to landlord. In the case of mortgagee and mortgagor, where the mortgagor has attorned to the mortgagee, it would not be said in popular language that the mortgagee was the landlord, but still rent is payable to him by reason of a tenancy. I think that is the meaning of the section. It speaks of one year's rent. One would not call a payment for gas consumed during a year "rent." Then, again, sect. 35 of the *Bankruptcy Act* says that "When any rent or other payment falls due at stated periods, and the order of adjudication is made at any time other than one of such periods, the person entitled to such rent or payment may prove for a proportionate part thereof up to the day of the adjudication as if such rent or payment grew due from day to day." This all tends to shew that the rent referred to is a rent payable in respect of a tenancy. Although, no doubt, the words "or other person" in sect. 34 create some difficulty, I think they must mean another person standing in a position analogous to that of a landlord to the person by whom that which is called rent is payable. As I have already said, I think this sum was not "rent" within the meaning of the section, nor was the gas company an "other person" to whom rent was due from the debtor.

Solicitors for Trustee: *Terrell & Honey.*

Solicitors for Gas Company: *Duncan, Murton, & Co.*, agents for *George Woodcock, Coventry.*

(1) 4 De G. & J. 224.

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M. R.

1877

March 2.

PENDER *v.* LUSHINGTON.

[1877 P. 35.]

Company—Member—Transfer of Shares to increase Voting Power—General Meeting—Rejection of Votes—Action against Directors—Injunction—Name of Company, Right to use.

Where the articles of association of a limited company provided that the company should not be affected with notice of any trust, and contained provisions that every member should be entitled to one vote at a general meeting for every ten shares, but should not be entitled to more than 100 votes in all, and that no member should vote at any general meeting unless he had been possessed of his shares for three months previously thereto:—

Held, that, according to the articles, a member of the company was a person whose name was on the register of shareholders; that the register was the only evidence by which the rights of members to vote at a general meeting could be ascertained; and that at a general meeting no votes of shareholders properly qualified and whose names had been three months on the register should be rejected on the ground that their shares had been transferred to them by other shareholders for the purpose of increasing their own voting power, or with an object alleged to be adverse to the interests of the company, or on the ground that the holders were not beneficial owners of the shares.

An action was brought by a shareholder whose vote was rejected, on behalf of himself and all others who had voted with him, naming the company as co-Plaintiff, against the directors, for an injunction to restrain them from acting on the footing of the votes being bad:—

Held, that the Plaintiffs were entitled to an injunction:

Held, also, that till a meeting should be called to decide whether or not the company's name should be used as Plaintiff, the company's name should remain on the record.

Statement.

THE *Direct United States Cable Company, Limited*, was a company registered under the *Companies Act*, 1862, with a memorandum and articles of association.

By the 2nd article the register of shareholders was directed "to be kept pursuant to the terms of the *Companies Act*, 1862."

By the 19th article it was provided that "the company shall not be affected with notice of any trust," also that "the executors of a deceased member shall be the only persons recognised by the company as having any title to his share."

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The following articles related to the provisions for voting at general meetings:—

Article 56: "No member holding less than ten shares is entitled to a vote, and every member holding at least that number of shares shall have one vote for every complete number of ten shares, with the limit that no shareholder shall be entitled to more than 100 votes in all."

Article 58: "If two or more persons are jointly entitled to vote in respect of any share or shares, the member whose name stands first on the register of members as one of the holders of such share or shares, and no other, shall be entitled to vote in respect of the same."

Article 59: "No member shall be entitled to vote in respect of any share that he has acquired by transfer at any meeting held after the expiration of three months from the registration of the company unless he has been possessed of the shares in respect of which he claims to vote for at least three months previously to the time of holding the meeting at which he proposes to vote."

Subsequent articles contained provisions for giving votes by proxy.

The Plaintiff, *John Pender*, was the registered holder of 1000 shares in the company. He was also chairman of the *Globe Telegraph and Trust Company, Limited*, which was formed in 1873 for the purpose of acquiring telegraphic shares and property, and which was worked in connection with the *Anglo-American Telegraph Company*.

On the 2nd of February, 1877, an extraordinary general meeting of the company was held pursuant to notice, at which *Pender* moved a resolution in these terms: "That it is expedient to put an end to the present antagonism of this company towards the *Anglo-American Telegraph Company* and its connections, and to work this company's cable in friendly alliance with their lines; and that a committee of shareholders be appointed to be named by the meeting to confer with the directors as to the best method of giving effect to this resolution, and to report to the shareholders thereon at such time as the meeting shall appoint."

This resolution was seconded and put to the meeting, whereupon

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an amendment thereto was moved by Mr. *Bramwell*, a shareholder of the company, which having been seconded was put to the meeting by the chairman, and declared to be carried by a large majority.

A poll was then demanded by Mr. *Pender*, and the meeting was adjourned to the 5th of February. Meanwhile the votes and the proxies, which had been duly lodged at the office, were examined by the scrutineers.

At the adjourned meeting it appeared from the report of the scrutineers that according to the number of votes recorded there would have been a majority of forty against the amendment, but the chairman ruled out 649 votes, and declared the amendment carried by a majority of 609. Mr. *Pender* then moved a second resolution, and the votes were again taken, and it would have been carried, but the chairman ruled out the same votes as before, and it was accordingly lost.

The grounds on which the chairman ruled out these votes were that they were given in respect of shares which had been transferred by certain large shareholders in the *Direct United States Cable Company*, who were also shareholders in the *Globe Telegraph and Trust Company*, and whose voting power was by Article 56 limited to 100 votes, to their own nominees who had no beneficial interest in the *Direct United States Cable Company*, and with the object of increasing the voting powers of the transferors and of furthering the views of the *Globe Telegraph and Trust Company*. These shares had been duly transferred to their present holders three months before the meeting was held, according to Article 59, and the names of the holders were on the register.

An action was then brought by *Pender* (on behalf of himself and all other the shareholders in the *Direct United States Cable Company, Limited*, who voted against the amendment to the first resolution, and in favour of the second resolution, at the said meetings) and the said *Direct United States Cable Company*, as Plaintiffs, and *E. H. Lushington* and others, the directors of the same company, as Defendants.

A motion was now made on behalf of the Plaintiffs to restrain the Defendants from ruling out the 649 votes, and acting contrary to the second resolution, until the hearing of the action.

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A summons was also taken out by the Defendants to strike out the name of the company as Plaintiffs, inasmuch as it had been used without the authority of the directors or of a general meeting.

Argument.

Fry, Q.C., *Davey*, Q.C., and *H. B. Buckley*, in support of the motion:—

The Plaintiff and those whom he represents are entitled to an injunction to restrain the rejection of the votes representing the 649 shares standing in the names of the Plaintiff and the shareholders in the *Globe Company*. They were clearly registered members of the company, and entitled to vote, having held their shares for three months before the general meeting was held. The fact that some of them were trustees for other persons, or that they were shareholders in a rival company, is immaterial, as the chairman had no right to inquire into the question whether they were beneficial owners, or whether they exercised their right of voting in the interest of another company.

In the case of *In re Stranton Iron and Steel Company* (1), where the holders of 1000 fully paid-up shares made nine transfers of 100 shares each to as many nominees of their own, in order that they might secure full voting power at a meeting of the company, and the directors refused to register the transfers, Vice-Chancellor *Bacon* held that the directors had no right to refuse to register them for the purpose of excluding the transferees from the exercise of their legal rights.

With regard to the form of the action, the directors have taken out a summons to strike out the name of the company, on the ground that it has been used without the authority of the directors or of a general meeting. This case, however, does not fall within the principle of *MacDougall* v. *Gardiner* (2) or *Foss* v. *Harbottle* (3). We submit that it comes within the exception referred to in *Foss* v. *Harbottle*, that when no action could otherwise brought, the shareholders must have a right to bring an action in the name of the company. Here the chairman acted improperly in the rejection of the votes, and, according to the principles

(1) Law Rep. 16 Eq. 559. (2) 1 Ch. D. 13.
(3) 2 Hare, 461.

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laid down in many cases, the action is properly framed: *Atwool* v. *Merryweather* (1); *Russell* v. *Wakefield Waterworks Company* (2); *East Pant Du United Lead Mining Company* v. *Merryweather* (3); *Exeter and Crediton Railway Company* v. *Buller* (4).

Argument.

Chitty, Q.C., and *W. G. Harrison*, for the Defendants:—

When it is clear that shares have been transferred to persons who have no beneficial interest in the company, and for the purpose of creating votes, and to be used in the interests of a rival company, you may then go behind the register: *Ex parte Bugg* (5); *Budd's Case* (6); *Cox's Case* (7).

Here the votes tendered, which were ruled out by the chairman, were given in respect of shares transferred by shareholders, who were also shareholders in the *Globe Company*, to their own nominees. By Article 56, the right of voting of each shareholder was limited to 100 votes. By transferring their shares to the present holders, the transferors virtually annulled that article, and increased their own voting power by the votes of persons who had no interest in the company. The chairman, therefore, was justified in rejecting them.

On the question raised by the summons, the name of the company cannot properly be used without the consent of a general meeting. The Defendants would not object to such a meeting being held, but the Court cannot in the meantime grant the injunction with the name of the company remaining improperly on the record.

Judgment.

JESSEL, M.R.:—

This is a motion by Mr. *J. Pender*, on behalf of himself and all shareholders who voted with him against an amendment, and the *Direct United States Cable Company, Limited*, as Plaintiffs, against *E. H. Lushington* and other gentlemen as Defendants, in substance to obtain the opinion of the Court that certain votes at a general meeting on behalf of the Plaintiff were improperly rejected by

(1) Law Rep. 5 Eq. 464, n.
(2) Ibid. 20 Eq. 474.
(3) 2 H. & M. 254.
(4) 11 Jur. 527.
(5) 2 Dr. & Sm. 452.
(6) 3 D. F. & J. 297.
(7) 4 D. J. & S. 53.

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the chairman. That is the substance of the case, though there are other technical questions to which I must also refer.

In all cases of this kind, where men exercise their rights of property, they exercise their rights from some motive adequate or inadequate, and I have always considered the law to be that those who have the rights of property are entitled to exercise them, whatever their motives may be for such exercise—that is as regards a Court of Law as distinguished from a court of morality or conscience, if such a court exists. I put to Mr. *Harrison*, as a crucial test, whether, if a landlord had six tenants whose rent was in arrear, and three of them voted in a way he approved of for a member of Parliament, and three did not, the Court could restrain the landlord from distraining on the three who did not, because he did not at the same time distrain on the three who did. He admitted at once that whatever the motive might be, even if it could be proved that the landlord had distrained on them for that reason, that I could not prevent him from distraining because they had not paid their rent. I cannot deprive him of his property, although he may not make use of that right of property in a way I might altogether approve. That is really the question, because if these shareholders have a right of property, then I think all the arguments which have been addressed to me as to the motives which induced them to exercise it are entirely beside the question.

I am confirmed in that view by the case of *Menier* v. *Hooper's Telegraph Works* (1), where Lord Justice *Mellish* observes: "I am of opinion that, although it may be quite true that the shareholders of a company may vote as they please, and for the purpose of their own interests, yet that the majority of shareholders cannot sell the assets of the company and keep the consideration." In other words, he admits that a man may be actuated in giving his vote by interests entirely adverse to the interests of the company as a whole. He may think it more for his particular interest that a certain course may be taken which may be in the opinion of others very adverse to the interests of the company as a whole, but he cannot be restrained from giving his vote in what way he pleases because he is influenced by that motive. There is, if I may say so, no obligation on a shareholder of a company to

(1) Law Rep. 9 Ch. 350, 354.

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give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interest.

This being so, the arguments which have been addressed to me as to whether or not the object for which the votes were given would bring about the ruin of the company, or whether or not the motive was an improper one which induced these gentlemen to give their votes, or whether or not their conduct shews a want of appreciation of the principles on which this company was founded, appear to me to be wholly irrelevant. Therefore I do not intend to enter into the question as to what the objects of the company were, or what was the mode in which it was proposed to carry out those objects. I am only bound to decide whether or not these people were entitled to vote. To that question I am now going to address myself.

It is admitted that the votes tendered were the votes of persons on the register of shareholders, and it is admitted that they had been possessed of those shares for at least three months previously to the time of holding the general meeting, which is what is required by the 59th article. That being so, their votes were rejected on this ground: It was said that the persons who gave the votes were trustees for other persons, and that these other persons, the *cestuis que trust* of those trustees, were also either holders in their own name or as *cestuis que trust* of other shares, amounting in the whole to more than 1000 shares, so that if all the shares to which the persons were entitled had been registered in one name, that person could not have given more than 100 votes, the 56th section of the articles saying, that every member holding at least ten shares shall have one vote for every complete number of ten shares, with this limit, that no shareholder shall be entitled to more than 100 votes in all.

Now the argument is, that the words "every member" mean, not a man registered on the list of shareholders, but any person beneficially entitled to shares, because if not carried to that extent I do not understand the argument at all. If it means that a man may hold 1000 shares beneficially, or that a man may disunite his shares, then there is no reason why he should be disqualified

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because he has one share in his own name or ten shares in his own name. Therefore the argument must go the whole length that any one man entitled beneficially to more than 1000 shares is not entitled to put them in the name of two or more persons as trustees for him, so as to allow those two or more persons to exercise the power of voting under the articles. It must go to that extent. But, taking even the restricted view, and reading the words "every member" to mean only a person whose name is on the register, then it means this, that any man whose name is registered as a holder of shares cannot, if he is the *cestui que trust* of other shares, give together with his trustee more votes than if all the shares were registered in his own name. Those are the propositions with which I must deal.

The first observation which strikes one is that these are votes at general meetings. How are you to ascertain who is to vote? That is pointed out by the articles of association. First, who are to be summoned to attend the general meetings? You find by Article 48 that notice is to be given to "the members hereinafter mentioned." What does the word "members" mean in that article? The definition clause, like many other definition clauses, is one which defines nothing. It says: "Member means member for the time being of the company," that is, member means member. But then one must remember that the word "member" has a meaning in the *Companies Act*, and it means *primâ facie* a registered shareholder or stockholder, and that must be the meaning here, because how else are you to give him notice at all? You can only give him notice by referring to the register which, under Article 2, is "to be kept pursuant to the terms of the *Companies Act*, 1862." So that a member is a man who is on the register.

[His Lordship then reviewed the several articles of association, which shewed that a member of this company meant a person whose name was on the register of shareholders, and that the title of any member to vote could only be found out by reference to the register. His Lordship then continued:—]

It appears to me that it is plain from reading these articles alone that the articles meant to refer to a registered member, but I think it is made, if possible, plainer—though I doubt whether it could be made plainer when you come to consider that it would not

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be possible to work the company in any other way, for how else could the company hold meetings or demand a poll, or have the votes taken by the scrutineers?—but if possible it is made plainer by the 19th article, which says: "The executors and administrators of a deceased member shall be the only persons recognised by the company as having any title to his share," and also provides that "the company shall not be affected by notice of any trust." And the 30th section of the *Companies Act*, 1862, says: "No notice of any trust express, implied, or constructive, shall be entered on the register, or be receivable by the Registrar in the case of companies under this Act, and registered in *England* or *Ireland*." It comes, therefore, to this, that the register of shareholders, on which there can be no notice of a trust, furnishes the only means of ascertaining whether you have a lawful meeting or a lawful demand for a poll, or of enabling the scrutineers to strike out votes.

The result appears to me to be manifest, that the company has no right whatever to enter into the question of the beneficial ownership of the shares. Any such suggestion is quite inadmissible, and therefore it is clear that the chairman had no right to inquire who was the beneficial owner of the shares, and the votes in question ought to have been admitted as good votes independently of any inquiry as to whether the parties tendering them were or were not, and to what extent, trustees for other persons beneficially entitled to the shares.

I now come to the subordinate question, not very material in the view I take of the case, namely, whether you have the right Plaintiffs here. The Plaintiffs may be described as three, though they are really two. There is, first, Mr. *Pender* himself, on behalf of himself; next, as the representative of the class of shareholders who voted with him, whose votes I hold to have been improperly rejected; and, next, there is the *Direct United States Cable Company*. It is said that the company ought not to have been made Plaintiffs.

The reasons given were reasons of some singularity, but there is no doubt of this, that under the articles the directors are the custodians of the seal of the company, and the directors, who in fact are Defendants, have certainly not given any authority to the

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solicitor for the Plaintiffs on this record to institute this suit in the name of the company as Plaintiffs. It is equally clear, if I am right in the conclusion to which I have come as to the impropriety of the decision of the chairman in rejecting these votes, that it is a case in which the company might properly sue as Plaintiffs to restrain the directors from carrying out a resolution which had not been properly carried, and then comes the question whether I ought or ought not to allow the company now to remain as Plaintiffs.

The first point to be considered is this: Supposing there was no objection to the right of a general meeting to direct an action to be brought, could I, even in that case, allow the company to sue? I think I could. In that case the general meeting, having a right to direct an action to be brought, would act by the majority of the members. The majority wish their rights to be protected. A meeting could be called, and, if the Court was satisfied that the majority would direct an action to be brought, the company's name would not be taken away. In the meantime the Court must act. It being decided that the company is a proper Plaintiff, that the grievance is one of which the company could complain, that the majority of the company are of that opinion, and that there is no time to call a formal meeting, what is the Court to do? Is it to refuse justice altogether, and say, it being a case for an injunction, that the directors are to have for several weeks (for the articles require three weeks' notice at least of a general meeting) the power of destroying the property and rights of the company altogether.

Such a course in cases of injunction would be equivalent to saying that there shall be no justice at all administered. It would be an absolute denial of justice, and it appears to me that the Court of Appeal, in the case of *MacDougall* v. *Gardiner* (1), have deliberately adopted that view of the matter, as I read the following observations of Lord Justice *James*: "Any one of the shareholders might have filed his bill in the name of the company, and then, if the directors had said, 'You are not the company; the majority do not act with you, but with us,' the Court would, as it has done in other cases, have taken the means of ascertaining which party

(1) 1 Ch. D. 22.

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it is, the Plaintiff's or the Defendant's, which really represents the majority of the company." I suppose he means that the Court may direct a meeting to be called. But what is the Court to do in the meantime, if it is satisfied that a real majority decided in favour of bringing an action? Surely it must do something in the meantime, and it follows, I think, from that portion of the judgment, that in the meantime the Court ought to grant the injunction to keep things *in statu quo*. It may be said that there is no such majority now, but it is nothing to me that the majority is changed. Therefore, while the Court directs a meeting to be called, or gives the shareholders facilities for calling a meeting, it acts in the meantime on the assumption that the majority of the former meeting have not changed their minds. Even if that is not the true meaning of the judgment, and it is not quite so explicit as I could have wished for my guidance, then the only other alternative is that it is a case in which it would be impossible for relief to be obtained by the company bringing an action, and it must be within the exception pointed out in *Foss* v. *Harbottle* (1), that the shareholders must have a right to institute an action in the name of one or more, because otherwise it would be impossible to maintain an action at all. Therefore on that view this is a perfectly good action.

But, acting on the first view, which appears to me to be the correct one, I think I ought not on this summons to take away the name of the company, but to let the summons stand over, leaving either party to call a meeting to decide whether the company's name is to be used or not. In the meantime, whether this is an action in the name of the shareholders or in the name of the company, in either case I think there should be an injunction.

[His Lordship then adverted to a point raised in argument, whether, according to the true construction of the articles, there was not absolute power in the directors for a period of five years to do what they pleased without the control of the company, and considered that they had no such power as to prevent an action being brought against them. He then continued:—]

But there is another ground on which the action may be maintained. This is an action by Mr. *Pender* for himself. He is a

(1) 2 Hare, 461.

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member of the company, and whether he votes with the majority or the minority he is entitled to have his vote recorded—an individual right in respect of which he has a right to sue. That has nothing to do with the question like that raised in *Foss* v. *Harbottle* (1) and that line of cases. He has a right to say, "Whether I vote in the majority or minority, you shall record my vote, as that is a right of property belonging to my interest in this company, and if you refuse to record my vote I will institute legal proceedings against you to compel you." What is the answer to such an action? It seems to me it can be maintained as a matter of substance, and that there is no technical difficulty in maintaining it.

Then it is said that there are several rights. No doubt they are rights of suing in a distinct character. I turn to Rules of Court, 1875, Order XVI., rule 1, and I find this: "All persons may be joined as Plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative." It seems to me that this ground of defence must necessarily fail.

The only other point was as to the resolutions themselves. I am not going to give any opinion as to what the effect of the resolutions may be when passed. The only point on which I am asked to decide is to say they ought to have been passed, in other words, that there was a majority for them, and to restrain the Defendants until further order from acting in contravention of them. It follows that, whether or not any reasons can be adduced at the trial to lead me to decide that the injunction shall be further continued, at the present moment it is my duty to say that the resolutions, being on the face of them quite legal, and having been passed by a majority, ought to be obeyed by the directors. I only grant that until further order. The majority in this case, as in other cases, may change their minds; and therefore it is suggested that the following words should be introduced into the order I am about to make: "Until some other resolution shall be passed by a general meeting;" so that my injunction may go no further than the present opinion of the majority warrants. I object to that modification. I think the applicants are entitled to the order they

(1) 2 Hare, 461.

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ask, which is subject to further order. The summons will stand over till the trial or further order, with liberty to either party to call a meeting.

Solicitors for Plaintiffs: *Bircham & Co.*
Solicitors for Defendants: *Johnsons, Upton, Budd, & Co.*

M. R. 1877 *March* 5.

DUCKETT *v.* GOVER.

[1876 D. 149.]

Practice—Company's Authority to sue—Company—Secret Contract—Action by one Shareholder on behalf of himself and others—Company Defendant—Name of Company, Right to use—Demurrer—Mistake of Law—Rules of Court, 1875, *Orders* XVI., *r.* 2; XXVIII., *r.* 8—*Making Company Plaintiff without Consent—Charges of Fraud—Costs.*

A shareholder in a company brought an action on behalf of himself and the other shareholders against the company's solicitors and vendor to set aside an alleged secret and fraudulent contract, and to recover a large sum of money for the company from their solicitors, the company being joined as Defendants instead of Plaintiffs.

A demurrer to the statement of claim by the Defendants, other than the company, on the ground that the action could only be maintained by the company, was allowed, but the Plaintiff obtained leave under Rules of Court, 1875, Order XVI., r. 2, to amend his writ and statement of claim by adding the company as Plaintiffs, the production by him of any authority from the company to sue in their name being held to be unnecessary.

As the Plaintiff charged fraud against the demurring Defendants, the question whether their costs of the demurrer should be paid by him was reserved till the trial of the action.

"*Bonâ fide* mistake" in Order XVI., r. 2, of the Rules of Court, 1875, includes a mistake of law as well as of fact.

Statement.

DEMURRERS to statement of claim.

The action was instituted by Sir *G. F. Duckett*, "on behalf of himself and all other the shareholders of the *Alton Coal, Coke, and Iron Company, Limited.*" The statement of claim alleged that the company was started in 1873 for the purpose of purchasing the *Alton Colliery*, the property of the Defendant *Nicholls*; that the Defendants *Gover & Norton*, acting as solicitors for and on behalf of the proposed company, agreed with the Defendant

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Statement.

Nicholls for the purchase of the colliery for £27,000, payable partly in cash and partly in debentures and shares of the company, but at the same time entered into a secret written agreement with *Nicholls* that the purchase-money should be represented as £34,000, instead of £27,000, upon the understanding that the £7000 difference should be paid to them, *Gover & Norton*, as a bonus or douceur for procuring the purchase; that the company, having been duly registered, purchased the colliery for £34,000, which was paid to *Nicholls* partly in cash and partly in debentures and shares of the company, as stated in the prospectus; that the prospectus, which was prepared by *Gover & Norton*, and printed under their direction, did not disclose the existence of the secret agreement; that *Gover & Norton*, without the company's knowledge or sanction, received the £7000 from *Nicholls* in cash, debentures, and shares; and, moreover, that *Gover & Norton* had, in the course of certain loan transactions conducted by them on behalf of the company, appropriated various sums of money to their own use and had never accounted for the same to the company.

The Plaintiff claimed to have the secret agreement between the Defendant *Nicholls* and the Defendants *Gover & Norton* declared fraudulent and void as against the company, and set aside accordingly; to have an account taken of all moneys received by the Defendants *Gover & Norton* in respect of the loan transactions, and to have repaid to the company all moneys which on taking such account should be found due from such Defendants; and to have the cash, debentures, and shares representing the £7000 paid and delivered up to the company.

The company were made Defendants in the action, but the statement of claim alleged no reason why they had been made Defendants instead of Plaintiffs, nor did it contain any allegation that the Plaintiff was unable to join them as Plaintiffs.

The Defendants *Gover & Norton* demurred separately to the statement of claim, on the ground that the Plaintiff was not competent to sue on behalf of himself and all other the shareholders of the company.

Argument.

Davey, Q.C., and *Mulligan*, for *Gover's* demurrer:—

The matters complained of by the Plaintiff, if true, are wrongs

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to the company, of which they, and they alone, can complain, and therefore the action should have been brought in their name, according to the well-known rule laid down in *Foss* v *Harbottle* (1), and followed in *Gray* v. *Lewis* (2) and *MacDougall* v. *Gardiner* (3).

[They were stopped by the Court.]

Cookson, Q.C., and *Bond Coxe*, for the Plaintiff:—

We do not dispute the general rule, nor do we contend that we are within any of the exceptions to it recognised in *Russell* v. *Wakefield Waterworks Company* (4). The objection that the company should have been named as Plaintiff instead of Defendant is a mere technical one, which, under the present practice, the Court will disregard. All parties being before the Court, it is not suggested that justice cannot be done if the action is allowed to proceed in its present form.

At all events, if we have been wrong in making the company a Defendant, we have acted under a *bonâ fide* mistake, and we therefore ask leave to amend our writ and statement of claim by adding the company as Plaintiff, under Rules of Court, 1875, Order XVI., rule 2; we undertaking to amend within fourteen days. If the demurrers are allowed, the demurring parties are not entitled to the costs of their demurrers, as they are charged with fraud: *Hodges* v. *Hodges* (5).

Chitty, Q.C., and *Levett*, for *Norton's* demurrer.

JESSEL, M.R:—It is clear that the company should have been made Plaintiffs, and therefore the demurrers must be allowed. I only wish to hear you, Mr. *Davey*, on the questions of amendment and costs.

Davey, in reply:—

As our demurrer is allowed, I submit that we are entitled to our costs. The Plaintiff is not entitled to any indulgence, for he has acted in defiance of a well-settled rule of law. This is, therefore, not a case of "*bonâ fide* mistake" within Order XVI., rule 2, so as

(1) 2 Hare, 461.
(2) Law Rep. 8 Ch. 1035.
(3) 1 Ch. D. 13.
(4) Law Rep. 20 Eq. 474.
(5) 24 W. R. 293.

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to justify the Court in granting the Plaintiff leave to amend: *Clowes* v. *Hilliard* (1). M. R. 1877 DUCKETT v. GOVER

[JESSEL, M.R.:—He has made a blunder on a point of law. A blunder is a "mistake."]

The rule applies only to a mistake of fact, as where a Plaintiff, having only an equitable title, has inadvertently omitted to join the holder of the outstanding legal estate. Before the Plaintiff obtains leave to amend, he should shew that he is authorized by the company to sue in their name, or that they are willing to be joined as Plaintiffs. Argument.

[JESSEL, M.R.:—That is not necessary.]

JESSEL, M.R.:— Judgment.

I am of opinion that I ought not, on the present occasion, finally to dispose of the question whether or not the Plaintiff should pay the costs of these demurrers.

Now, what is the practice of the Court? Order XXVIII., rule 8, says that "where a demurrer to the whole or part of any pleading is allowed upon argument, the party whose pleading is demurred to shall, unless the Court otherwise order, pay to the demurring party the costs of the demurrer." Therefore, the Court may "otherwise order."

The case is this: It is an action by a shareholder of a company against the solicitors of and a vendor to the company, charging gross fraud. I do not say that the charges are true; they are only admitted for the purpose of pleading. If they should turn out to be true, the company will recover a large sum from the Defendants, the solicitors. Therefore, though not technically, yet substantially, the company is a trustee for the shareholders, and the shareholders are *cestuis que trust* of the company. By a mistake of law—as I am assured at the bar, and as I also believe, from the fact that the demurrers have been allowed to come here for argument—the Plaintiff has made the company Defendant instead of Plaintiff, and he now asks leave at the bar to add the company as Plaintiff, preferring that his name, as the original Plaintiff, should remain on the record, and he will give an undertaking to amend within fourteen days.

(1) 4 Ch. D. 413.

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Can I allow this to be done? He says I can do so under Order XVI., rule 2, which provides that "where an action has been commenced in the name of the wrong person as Plaintiff, or where it is doubtful whether it has been commenced in the name of the right Plaintiff or Plaintiffs, the Court or a Judge may, if satisfied that it has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person or persons to be substituted or added as Plaintiff or Plaintiffs upon such terms as may seem just."

Now that unquestionably extends to a mistake in substance, and in nine cases out of ten if there is a mistake in substance it will be found that there is a mistake in law. Why should it not include a mistake in law? In my opinion it does.

Then the Court may order a Plaintiff to be added "if it is necessary for the determination of the real matter in dispute so to do." Well, the question in dispute here cannot be determined at all without the company, and as the action cannot be maintained except by the company as Plaintiff, all I have to consider is upon what terms it is, according to the words of the rule, "just" that I should order the company "to be added as Plaintiff."

Now, if this case of fraud is ultimately established, it would be wrong to make the Plaintiff pay the costs of these demurrers. I also consider it would in no way be right to make the demurring parties pay the costs, for they have succeeded on their demurrers; but if fraud is established against them I shall not give them any costs.

I will therefore give the Plaintiff leave to amend, and reserve the question whether the costs of the demurrers should be paid by the Plaintiff.

The demurrers must therefore be allowed, with liberty for the Plaintiff to amend his writ and statement of claim within fourteen days by adding the company as Plaintiffs. If the Plaintiff does not amend within fourteen days, the action will be dismissed. The costs of the demurring parties are reserved till the trial of the action.

Solicitors: *W. F. Nokes; J. D. Gover; E. Norton.*

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[1877 F. 41.]

Husband and Wife—Post-nuptial Settlement, voluntary or for Valuable Consideration—27 Eliz. c. 4.

By a post-nuptial settlement certain freeholds belonging to the wife were settled by the husband and wife to the use of the wife for life, and after her decease to such uses as she should by will appoint, and in default of appointment to the use of her children, with a power during her life for the wife to lease at rack rent, and with a power of sale and exchange in the trustees with her consent:—

Held, that the settlement was for valuable consideration, and therefore not void under 27 Eliz. c. 4, and that the same must be upheld against a subsequent mortgagee.

Goodright d. *Humphreys* v. *Moses* (1) and *Currie* v. *Nind* (2) commented on.

Butterfield v. *Heath* (3) disapproved.

Statement.

THIS was a summons taken out under the *Vendor and Purchaser Act*, 1874, by the vendor *Edmund Foster*, the question being whether a settlement affecting the property comprised in a contract for sale was voluntary and void as against the vendor.

By a post-nuptial settlement dated the 5th of December, 1857, and made between *Edward Sennett* and *Alice* his wife of the one part, and *John Graves* and *David Parish* (the trustees) of the other part, after reciting that it had been agreed that certain freehold and copyhold lands belonging to the said *Alice Sennett* should be settled in manner thereinafter mentioned, it was witnessed that in pursuance of the agreement *Edward Sennett* and *Alice* his wife did thereby grant all the freeholds unto the said trustees and their heirs to hold the same to the use of *Alice Sennett* and her assigns during her life without impeachment of waste, and after her decease to the use of such person or persons and in such manner as *Alice Sennett* should, notwithstanding coverture, by will appoint, and in default of such appointment to the use of all her children (there being children of the marriage) as

(1) 2 W. Bl. 1019. (2) 1 My. & Cr. 17.
(3) 15 Beav. 408.

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tenants in common, with a power for *Alice Sennett* during her life, and after her death for the said trustees, at any time during the continuance of any trust arising under the settlement, to appoint by way of lease at rack rent any part of the said hereditaments for a term not exceeding twenty-one years; and with a power to the trustees, with the consent of *Alice Sennett*, during her life, and after her death at their discretion, to sell and exchange the said hereditaments, or any part thereof, as therein mentioned.

Subsequently to the date of the settlement the hereditaments comprised therein were mortgaged by *Edward Sennett* and *Alice* his wife, to *Edmund Foster*, with a power of sale. Both deeds were acknowledged by *Alice Sennett*.

The said *Edmund Foster* contracted with *John Lister* for the sale to him, under the power of sale in his mortgage, of the said hereditaments, but the objection was taken to the title on behalf of the intending purchaser that the said settlement of the 5th of December, 1857, was for good and valuable consideration and valid, and therefore that the vendor had not shewn a good title to the premises.

Argument.

Cozens-Hardy, for the vendor:—

The settlement of the 15th of December, 1857, was voluntary, and therefore void, under the statute of 27 Eliz. c. 4, as against the subsequent mortgagee. The authorities on the subject are conflicting. In *Goodright* d. *Humphreys* v. *Moses* (1) and *Currie* v. *Nind* (2) settlements of a similar nature were held to be voluntary and void. *Butterfield* v. *Heath* (3) was a similar decision by Lord *Romilly*, although in *Hewison* v. *Negus* (4) he decided the other way and upheld the settlement, and that decision was affirmed on appeal (5). The most recent case on the subject is that of *Teasdale* v. *Braithwaite* (6), in which Vice-Chancellor *Bacon* followed *Hewison* v. *Negus*. But that case is now under appeal (7).

Rodwell, for the purchaser, was not called on.

(1) 2 W. Bl. 1019.
(2) 1 My. & Cr. 17.
(3) 15 Beav. 408.
(4) 16 Beav. 594.
(5) 22 L. J. (Ch.) 655.
(6) 4 Ch. D. 85.
(7) Affirmed on appeal, 5 Ch. D. 630.

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JESSEL, M.R.:—

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Judgment.

The only question before me is whether the indenture of the 5th of December, 1857, between *Edward Sennett* and *Alice* his wife, of the one part, and *John Graves* and *David Parish*, trustees, of the other part, is a settlement made for value, or is voluntary, which depends, as I understand, simply upon two things: first of all, upon the construction of the settlement itself; and secondly, upon the law as to what a voluntary settlement is. First of all, on the construction of the settlement itself, independently of the question whether the mere concurrence of the husband, his concurrence being necessary for the conveyance of the wife's estate, is value on his part, there arises also the question whether he did not give up something. It is not a voluntary settlement if there is anything in the shape of consideration which can be called value. [His Lordship then stated the purport of the settlement.]

What, then, does the husband give up? There were children of the marriage at that time, consequently the husband was entitled by law to an estate during her coverture, and also, if he survived his wife, to an estate for the remainder of his life as tenant by the curtesy. Thus the wife was entitled to the fee simple, subject, of course, to those interests in the husband. But she had no power to convey the fee simple, or to make any lease of any part of it, or to sell it without his concurrence. That was their position before the settlement. What is their position after the settlement? The husband loses his estate by the curtesy. He does retain, in a sense, his estate during the coverture, for, oddly enough, the limitation (whatever they intended) to the use of the wife is only during her life, without impeachment of waste, but it does not say for her separate use. The husband gives up not only the estate by the curtesy, but also the power of preventing the wife from alienating the estate during his life, so that if she died in his lifetime it would descend to the heir-at-law, most probably his child, as he had several children by her.

On the other hand, what is the wife's position? The wife is reduced from being an owner in fee to a life estate, with a testamentary power of appointment, the estate going, in default, to her children. But she gains several things—a power of alienation in

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this sense, that she has the right to lease the property at a rack rent, which is reserved to her alone, and which is a valuable right, and she has a right to concur in a sale without her husband concurring at all. That power, which was in the husband, is now transferred to trustees, who may sell the life estate. How can anybody doubt that the positions of husband and wife were most materially altered by this settlement, and that what the husband gave to the wife was value as between him and the wife, and what the wife gave up was also value on her part? As a question of principle, this is a bargain between husband and wife, altering their relative positions as to the estate, and their relative rights and interests in the estate. What one gave up the other acquired, subject to default in exercising the power of appointment which would carry it to the children.

That being so, if there were no authority on the question I should have said it was quite clear that it was an agreement lawful between husband and wife, and that the husband gave value, and that the wife gave value, and that, therefore, the settlement was one for valuable consideration, and was not within the statute, which only applies to settlements where there is no valuable consideration at all. But this not being a matter of first impression, I have been told that whatever my opinion of the law may be as to the principle on which such a case ought to be decided, I am not at liberty, especially having regard to questions affecting titles to estates, to disregard the authorities, and I have been referred, I believe, to all those which have any bearing on the matter.

Now, the first authority referred to was the case of *Goodright* d. *Humphreys* v. *Moses* (1). The case was this: Under a marriage settlement, *Elizabeth*, the wife of *Thomas Harris*, was entitled to freehold property as tenant in tail, with an ultimate remainder in fee as the right heir of her mother, who was tenant in tail in possession. On the 2nd of January, 1747, she, with the concurrence of her husband and her father, *Joshua Reade*, who had a preceding estate for life, covenanted to levy a fine and declared the uses to *Walter Grant* and *Joseph Humphreys*, and their heirs, in trust, as to the rents and profits, for *Joshua Reade* for life, and after his decease, in order that the same rents and

(1) 2 W. Bl. 1019.

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profits might be applied for the maintenance of the said *Thomas Harris* and *Elizabeth Harris* and their children, during the life of *Thomas Harris*, and after his decease for the maintenance of the said *Elizabeth Harris* and her children, during the life of the said *Elizabeth*, and after their several deceases, that the trustees should by sale or mortgage raise a sum not exceeding £700 for the younger children of *Thomas* and *Elizabeth Harris* (exclusive of the right heirs of the said *Elizabeth* by reason of the subsequent limitation of the surplus to their use) payable as therein mentioned; and, after raising the same, in trust to convey the residue and remainder of the premises to the right heirs of the said *Elizabeth* for ever. The report adds, "No leasing power contained in the deed." There is such a power contained in this deed. Then *Joshua Beade* died, and then *Thomas Harris* died. Then *Elizabeth Harris*, who was the survivor, made a lease of the property to *Thomas Moses* at £55 a year, who laid out £100 in improving the premises. Then, on the 10th of December, 1771, *Elizabeth Harris* died, and, on the 13th of May, 1772, *Joseph Humphreys*, the surviving trustee, and *Thomas Harris*, the eldest son of *Elizabeth Harris*, and all the younger children of *Elizabeth*, in consideration of £2150 conveyed all the property to *James Blake* and his heirs, who had notice from *Moses* of the lease. Then ejectment was brought by the Plaintiff claiming his title under *Blake*.

The question was, whether the deed of 1747 was a voluntary conveyance. It was said the only consideration that could be considered to pass to the wife by the deed of 1747 "was the certainty of maintenance for herself and children during the life of her husband, which is not a legal but only a moral consideration." The remarkable part of the trust was that for the support and maintenance of *Harris* and wife, and their children, during the life of *Harris*. Then, afterwards, it was for the maintenance of *Elizabeth Harris* and her children during her life. It seems to have been forgotten that *Harris* gave up something; he would have a life estate, and an estate by the curtesy, and he came under a legal obligation to maintain the wife and children. He might have been under a legal obligation that was personal to a limited extent to maintain his children under the Poor Law Acts, but this was a new obligation certainly. Having cut down, there-

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fore, what was before a life estate, he had this limited interest. Therefore he gave value, and that seems to have been forgotten altogether. The wife had nothing during his life, and her estate, no doubt, was cut down after his death; she got less than the fee. It seems to have been assumed that the value given by the husband was immaterial, and not to be considered. There is not a word said about the value he gave. In the next place it is said that the certainty of the maintenance by the husband was not a legal but only a moral consideration. The mistake was this: she had a right to be maintained by her husband. That was the legal right, but only out of his means. This gave her a right to be maintained out of the estate, even although he had become bankrupt, or anything else. It is clear, therefore, that was a valuable consideration.

However, we get this judgment, as reported at all events, from *De Grey*, C.J. (1), "That the deed of 1747 was only a voluntary conveyance within the true meaning of the statute 27 Eliz., being founded only upon a good and not upon a valuable consideration." With the greatest possible deference it was clearly valuable consideration, but the point that the husband gave value was not argued at all. In fact the points as to giving up the life estate, and as to his parting with his control over the alienation of the estate were not argued. That was altogether missed, and as to the value on the part of the wife, she clearly gave value. Then he says that it therefore cannot be set up against a *bonâ fide* purchaser. That is all that is said upon the point. It appears to me, therefore, it cannot be considered a decision on a point that was neither argued nor referred to in the judgment; and although I entirely differ from the judgment, if I may say so, thinking that it is erroneous, even on the point that was submitted, yet it might be from its great age and recognition binding upon me, even if I thought it was wrong; but it is not binding upon me as to a point which was neither argued nor decided.

Then the next case referred to was *Currie* v. *Nind* (2), which was a decision of Lord *Cottenham*, when he was Master of the Rolls. I confess, speaking humbly, that I do not understand altogether, or follow the judgment. But I am clear that the case did not call

(1) 2 W. Bl. 1019. (2) 1 My. & Cr. 17.

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for a decision upon this point. The case was this: *David Cookes*, by his will, gave to the trustees, *Law* and *Garden*, of whom *Law* was the survivor at the testator's death, and their heirs, all his copyhold property, in trust for his wife, *Mary Cookes*, and her assigns for her life, with remainder upon certain trusts for the benefit of the testator's children; but he directed that if he should die without issue, his trustees, or the survivor of them, should surrender the copyhold premises to the use of such person or persons and for such estate and estates as his said wife by her last will, or any deed in writing under her hand duly executed and attested, should direct or appoint, and in default of such appointment, to the use of the testator's brother, his heirs and assigns. Thus, on the death of the testator, *Law*, the surviving trustee, took the legal estate in the copyholds, and *Mary Cookes*, the widow, took an equitable estate for life, with an equitable power of appointment by deed or will, with an equitable remainder—though it is copyhold I call it a remainder—in fee to the testator's brother.

In that position of matters, *Mary Cookes* married one *Wynne*, and by deed, dated the 16th of November, 1774, a settlement was made, *Law* being a party to it, whereby, after reciting that one *Burton* had agreed to lend *Wynne* and his wife £1600 upon a mortgage or conditional surrender of the copyholds, *Wynne* and *Mary* his wife, in pursuance of her power, appointed the copyhold premises unto and for such uses, estates, intents and purposes, and under and subject to such provisoes as were thereinafter mentioned concerning the same, and in order thereto and for that purpose *Wynne* and his wife did direct and appoint that *Law* should alone, or jointly with *Wynne* and his wife, surrender the same premises to the use and behoof of *Burton*, his heirs and assigns, in trust for securing unto *Burton* £1600 and interest, and subject thereto to the use of *Wynne* and his wife during their joint lives, and the life of the survivor of them, and after the death of the survivor, in case there should be any daughter or daughters, younger son or younger sons of the marriage, in trust to sell the copyhold premises, and to divide the purchase-money, after deducting expenses, amongst the children. On the same day, *Law*, who had the legal estate in the copyholds, and *Wynne* and wife, she being solely and separately examined—what for I do not know, as she had

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only an equitable interest during the coverture—surrendered the copyholds to the use of *Burton*, and he got the legal estate; and in 1788 *Wynne* and wife and *Burton* sold to *Parry*, whose devisees were Plaintiffs in the suit which came before the Court in 1835, and which was instituted for the specific performance of a contract for the sale of the estate, and the question was who was entitled to the property in remainder?

It was said that the settlement of 1774 was purely voluntary; and, inasmuch as the settlement was made under the power, as far as the fee was concerned, it is difficult to see why it was not. The husband's concurrence was not required in order that the married woman should exercise an equitable power. She could exercise that alone. His life estate was provided for; and, therefore, he certainly gave no value. His concurrence was not value, because it was not wanted, and he did not give up his life estate, or rather estate during the coverture. On the contrary, it was enlarged. He got a survivorship estate. So that he gave nothing, and, therefore, how it could be a settlement for value one does not exactly see. The wife had power to appoint to whom she pleased, and the appointment was voluntary as far as she was concerned. It was only dealing with the copyhold inheritance after the life estate had expired. It seems to me that it was plainly voluntary. But it was argued in all sorts of ways, and the only point I have to consider is, What is the judgment? The Master of the Rolls, after referring to the objections raised by the purchaser, says this (1): "Upon the second and third objections I am of opinion that the property in question, being the property of a married woman, and the settlement being made during her coverture, does not prevent the statute 27 Eliz. from operating upon it." Whatever this is worth, I do not exactly know what it means. It does not apply to the fine. If he means that by a married woman executing a power and thereby making a conveyance that is voluntary, I agree with him; but if it means anything else, I do not know what it means. Then he says: "*Goodright* d. *Humphreys* v. *Moses* (2) is decisive as to this; and no objection is made to the surrender as not being sufficient to pass such interest as the wife could by these means part with." What that means I do not

(1) 1 My. & Cr. 25. (2) 2 W. Bl. 1019.

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know. She had only an equitable interest. That did not pass by the surrender at all, but by the prior deed. It was neither made better nor worse by her surrender. Then he says: "That copyholds are within the statute is now fully established by the late case of *Doe* d. *Tunstill* v. *Bottriell*" (1). Whatever the value of that authority may be, it does not decide the point before me, and is not so intelligible as I should have expected a judgment of that great Judge to be.

Then the third case is *Butterfield* v. *Heath* (2). In that case Mr. and Mrs. *Phillips* married and had children; Mrs. *Phillips* afterwards became the owner in fee simple of some freehold land. Then, on the 7th of February, 1839, there was a settlement executed whereby, after a recital that Mr. and Mrs. *Phillips* were mutually desirous of settling the property, in pursuance of that desire all the property was conveyed in fee in trust for the husband for life, with remainder to the wife for life, and after the decease of the survivor in trust for the issue of the marriage as the husband and wife should appoint, and in default of such appointment to all the children of Mrs. *Phillips* as tenants in common in fee simple, with cross-remainders between them, and in default of such children to Mr. *Phillips*, the husband, in fee.

Now, Mr. *Phillips*, the husband, took, under that conveyance, first of all, an estate for life, and then a contingent remainder in fee. What did he give up? He gave up his estate during the coverture and his estate by the curtesy, which no doubt together were equivalent to an estate for life, not exactly the same estate, but the same interest. But he also gave up the right of controlling the alienation by his wife. He parted with that for ever, and obtained an ultimate reversion in remainder in fee. It seems to me that he did give value, and that he purchased for value that which he became entitled to under the settlement. On the other hand, did not the wife give value? She had a pure and simple estate in fee, subject only to her husband's estate during coverture, and estate by the curtesy. She cuts herself down to an estate for life, in order to give it to her own children as tenants in common in fee simple, with an ultimate gift in default to the husband in fee.

(1) 5 B. & Ad. 131. (2) 15 Beav. 408.

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Surely she gave value for it. However, Lord *Romilly* held that the settlement was voluntary.

I need not comment upon that judgment, because I am going to refer to another judgment of the same Judge in the case of *Hewison* v. *Negus* (1), which is exactly to the opposite effect, and which I think is right in principle. There the wife was entitled in reversion to a moiety in freehold estates, and by a post-nuptial settlement, dated the 9th of November, 1848, and duly acknowledged, Mr. and Mrs. *Negus* conveyed their moiety of the estate, subject to the prior life estate, to trustees and their heirs, upon trust to pay the rents to Mrs. *Negus* for life, for her separate use, and without power of anticipation, with remainder to Mr. *Negus* for life, and after the decease of Mr. and Mrs. *Negus*, to the use of such person or persons as Mrs. *Negus* should by will appoint, and in default of appointment to the use of her children as tenants in common in fee, with cross remainders between them, with an ultimate limitation to Mrs. *Negus* and her heirs.

That was supported by Lord *Romilly* as being for value. The husband gave up something, very little, but he gave up his chance no doubt of an estate during the coverture (for the wife's estate had got into possession), and an estate by the curtesy in the freeholds, and he gave his wife the first life interest in the estate. So that he gave up something, and in addition he gave up the power of concurrence, and the wife gave up her fee simple, which she got instead of the estate for life in possession with remainder to her children; and upon that Lord *Romilly* says—and I agree with him—that that is a settlement for value, which cannot be disturbed, the only difficulty being to reconcile that with his previous decision. That case, however, did go by way of appeal before the Lords Justices in Chancery (2), and the decree was affirmed by the Lords Justices, who said they considered that the settlement was a bargain for value between the husband and the wife, and therefore sustainable, and ought to be sustained against a subsequent dealer, dealing with the estate. You must find in a bargain that either one or the other gives up something before you can find that it is for value.

Then the last case I will say very little about, because I am told

(1) 16 Beav. 594. (2) 22 L. J. (Ch.) 655.

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Judgment.

that it is under appeal (1). That is the case of *Teasdale* v. *Braithwaite* (2), and it is a decision to the same effect. The Vice-Chancellor *Bacon*, after saying that he is bound by the decision of *Hewison* v. *Negus* (3), says, "It is settled that if husband and wife, each of them having interests, no matter how much, or of what degree, or of what quality, come to an agreement which is afterwards embodied in a settlement, that is a bargain between husband and wife, which is not a transaction without valuable consideration."

I think, therefore, that, taking into consideration that the only decision of the Court of Appeal which has been cited to me is in favour of the view I am disposed to take of this case, so far from the authorities being against what I consider to be the true principle, they are in favour of it, and consequently this must be treated as a settlement for valuable consideration.

Solicitors for Vendor: *Field, Roscoe, & Co.*, agents for *Fosters & Lawrence, Cambridge.*

Solicitors for Purchaser: *Tompson, Pickering, Styan, & Neilson*, agents for *Evans & Son, Ely.*

In re WHEATCROFT.

M. R.
1877
June 8.

Solicitor and Client—Handing over of Client's Papers to New Solicitors—Right to retain Letters of Client, and Copies of Letters in Letter-Book.

A solicitor is entitled to retain as his own property letters addressed to him by his client and copies in his letter-book of his own letters to the client, after the client has transferred the business to which such letters related to other solicitors.

Statement.

THE applicant, who was the legal personal representative of a deceased testator, had employed Mr. *Wheatcroft* as her solicitor in business connected with the administration of the testator's estate until October, 1876, when she ceased to employ him, paid him his bill of costs, and transferred the business to other solicitors, to whom *Wheatcroft* handed over the deeds, books, papers, and writings relating to the said business.

(1) Affirmed on appeal, 5 Ch. D. 630. (2) 4 Ch. D. 85, 90.
(3) 16 Beav. 594.

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M. R. 1877 *In re* WHEATCROFT.

The question arose whether *Wheatcroft* was entitled to retain certain original letters written to him by the applicant in connection with the business, and also copies of his letters to the applicant in his own letter-book.

A summons was taken out for the delivery up of the said letters and copies, which was adjourned into Court.

Argument.

Chitty, Q.C., and *Dunn*, for the applicant.

Ince, Q.C., and *Russell Roberts*, for Mr. *Wheatcroft*, submitted that these letters and copies were the private property of the solicitor. They referred to *In re Thomson* (1).

Judgment.

JESSEL, M.R., held that the solicitor was entitled to retain the letters from the client and the copies of his own letters in his letter-book, as such letters and copies were his own property.

Solicitors for Applicant: *Torr & Co.*
Solicitors for Respondent: *Chester & Co.*

M. R. 1877 *June* 12.

PINNEY *v.* HUNT.

[1876 P. 165.]

Suppressed Will—Partition Action—Probate Proceedings in Chancery Division—Jurisdiction—Judicature Act, 1873, *ss.* 34, 36—*Judicature Act*, 1875, *s.* 11.

A Plaintiff claiming a share of leaseholds, partly in the occupation of the Defendant, under an alleged will, which he charged was being fraudulently suppressed by the Defendant, brought an action claiming partition or sale, and to have the will established and directions given for probate. The Defendant denied all knowledge of the alleged will:—

Held, first, that before the Plaintiff could obtain any relief upon the will, it must first be proved, or probate must be admitted by the Defendant; secondly, that a Judge of the Chancery Division had, under the Judicature Acts, jurisdiction to grant probate, but that it would not be using a sound discretion to exercise the jurisdiction.

Action accordingly ordered to stand over for probate proceedings to be taken in the Probate Division.

Statement.

THE Plaintiffs in this action alleged in their statement of claim that under the will, dated in 1815, of *Maria Pinney*, deceased,

(1) 20 Beav. 545.

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certain leasehold premises, parts of which were now in the occupation of the Defendant, *Frances Hunt*, widow, had become vested, as to two undivided fourths thereof, in the Plaintiff, Sir *R. G. Glyn;* as to one other fourth, in the Plaintiff, *John Pinney;* and as to the remaining fourth, in the Defendant, *Frances Hunt.*

Statement.

The Plaintiff, *John Pinney*, had contracted to sell his one-fourth to his co-Plaintiff, Sir *R. G. Glyn*, but no assignment of such share had yet been executed.

The Plaintiffs alleged that both the will—which had never been proved—and the lease of the property were in the Defendant's possession, but that she had persistently refused to produce them; that she was in fact fraudulently withholding and concealing the said will and lease, and now denied all knowledge thereof; and the Plaintiffs charged that, if the said will and lease were not in the Defendant's possession or under her control, she had fraudulently destroyed or made away with the same.

The Plaintiff, Sir *R. G. Glyn*, had applied to the Defendant for occupation rent in respect of the shares to which he claimed to be entitled, but she refused to pay any such rent, denying the Plaintiff's title.

Under these circumstances the Plaintiffs wished to have a partition or sale of the property, and the will produced, in order that the same might be established and proved against the Defendant; the Plaintiff, Sir *R. G. Glyn*, as one of the persons beneficially interested under the will, being desirous of proving the same.

The Plaintiffs accordingly claimed, first, a partition or sale; and, secondly, "to have the said will of *Maria Pinney* established, and directions for the probate thereof given by the Court."

The Defendant, in her statement of defence, repudiated all knowledge of the will and lease, but stated that about ten years ago two legal documents then in her possession, but with the purport of which she was unacquainted, were stolen from her house, and that she had never recovered them since.

The action now came on for trial.

Argument.

Chitty, Q.C., and *Rigby*, for the Plaintiff:—

Although we ask that the will may be established and directions

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M. R. 1877 PINNEY v. HUNT. Argument.

given for probate, it is not absolutely necessary that the will should first be proved in order to entitle us to relief. In the case of a fraudulently suppressed will, which we allege here, the old Court of Chancery granted a Plaintiff immediate relief without sending him to the Ecclesiastical Court to prove the will: *Tucker* v. *Phipps* (1); and even went so far as to grant relief against probate if obtained by fraud: *Barnesly* v. *Powel* (2).

[*Ince*, Q.C., *amicus curiæ*:—In *Meluish* v. *Milton* (3) the Court of Appeal held that the Court of Probate had exclusive jurisdiction to relieve against a fraudulent will.

JESSEL, M.R.:—Following *Allen* v. *M'Pherson* (4).]

A Judge of the Chancery Division has now the same jurisdiction as any other Judge, and may retain any action which has once commenced in that Division: *Judicature Act*, 1873, ss. 34, 36; *Judicature Act*, 1875, s. 11.

This being an action for partition or sale, it has been properly assigned to the Chancery Division, and we ask your Lordship to exercise the jurisdiction you now possess by directing probate if necessary, and thus save the expense of double proceedings.

Davey, Q.C., and *G. Henderson*, for the Defendant, were not called upon, but in reply to a question put by his Lordship, declined to waive any objection as to probate, or to consent to the action being tried at once, and desired that the question of probate should be dealt with by the Probate Division in the ordinary course.

Judgment.

JESSEL, M.R.:—

My view of the matter is this: I consider that in all branches of the Court the only evidence of a will of personal estate is the probate, and that before you can ask the Court to look at the will and to grant any relief upon it you must prove it.

Now I do not doubt for a moment that under the powers given me by the Judicature Acts I have the same jurisdiction as other Judges of other Divisions. It is clear that all the Judges of the

(1) 3 Atk. 359; 1 Set. Dec. 3rd Ed. p. 633.

(2) 1 Ves. Sen. 284, 287.

(3) 3 Ch. D. 27.

(4) 1 H. L. C. 191.

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High Court have the same jurisdiction, and it is equally clear that any Judge may, if he chooses, when an action has been brought in the wrong Division, retain the action and exercise the jurisdiction. On these points I feel no doubt. It is discretionary in the Judge whether he will or will not take upon himself the exercise of the jurisdiction in any matter which by the Act of 1875 is assignable to another Court.

In this case the jurisdiction I am asked to exercise is that of granting probate, for that is the real meaning of the Plaintiff's claim. Now it does appear to me to be exceedingly inconvenient for many reasons that any Judge except a Judge in the Probate Division should grant probate. In the first place, a question of a disputed will can be much better tried before a Judge who has had experience in such matters, and in a Division in which all the proceedings incident to the grant of probate, such as citations, and so forth, are accustomed to be taken, than before a Judge who has had no such experience, and in a Division not possessing the requisite machinery for dealing with such business.

If the Plaintiff's contention is right, the whole course of business in this Division would be changed, and nearly the whole of the business of the Probate Division would be transferred here, because a legatee would have nothing to do but to bring an action for his legacy, and ask to have the will established or proved, and upon the objection being taken that he could not maintain the action in consequence of the will not having been first proved, his answer would be, "I have got my witnesses and I can prove it now." In my opinion it would be highly inconvenient to allow such peculiar business as that of the Probate Division to be distributed over all the other Divisions; and I am satisfied that it would not be a sound exercise of discretion on my part if I were to grant probate when there is a Division especially fitted for dealing with such business.

The case of *Tucker* v. *Phipps* (1), which was relied on by the Plaintiff, does not apply to the present, because there the will, though not proved, was admitted by the answer; and though I do not say that that was the *ratio decidendi*, yet there can be no doubt that in the Court of Chancery in modern times, just as in

(1) 3 Atk. 359.

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M. R. 1877 PINNEY v. HUNT. Judgment.

the olden times, if *A.* filed a bill in an administration suit claiming a legacy and alleging probate untruly, and the Defendant put in an answer admitting the will and probate, *A.* could get a decree because of the admission in the pleadings. I have known that done several times. The object was not a fraudulent one, but simply to get a decree before other persons could do so. You kept back your decree until you got your probate, the probate being produced to the Registrar after the hearing.

In the present case I do not intend to dismiss the action, but shall order it to stand over generally, with liberty to apply. The Plaintiff must use due diligence in applying to the Probate Division for a grant of probate, and if he fails in obtaining it, he will be at liberty to bring on his action again and shew whether he is able to maintain it on other grounds.

Solicitors for Plaintiff: *Gregory, Rowcliffes, & Rawle,* agents for *C. M. C. Whatman, Salisbury.*

Solicitors for Defendant: *Venning, Robins, & Venning,* agents for *C. T. Robins, Shaftesbury.*

M. R. 1877 June 16.

In re LANGHAM SKATING RINK COMPANY.

Company—Winding-up—Company's unpaid Costs of former Petition—Appointing Company's Solicitor Provisional Liquidator to receive Costs—Subpœna for Costs—Cons. Orders XL., *r.* 38; XXVIII., *r.* 1.

Where a shareholders' winding-up petition had been dismissed with costs to be paid by the Petitioners to the company, and afterwards, before the costs were paid, the company was ordered to be wound up on a creditor's petition, but in consequence of a liquidator not having yet been appointed a proper discharge could not be given on behalf of the company for their costs of the first petition, the solicitor to the company was appointed provisional liquidator, without salary or security, to receive the costs, upon his making an affidavit that they had not yet been paid to him.

Statement.

A PETITION to wind up the *Langham Skating Rink Company, Limited,* having been presented by *Tweed* and others, shareholders in the company, an order was made by the Court of Appeal, on the 14th of March last, dismissing the petition, with costs—including costs of appeal—to be paid by the Petitioners to the company.

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M. R. 1877

In re LANGHAM SKATING RINK COMPANY.

Pending the taxation of the costs, the company was ordered to be wound up on a creditor's petition, but no liquidator had yet been appointed.

Upon the taxation of the company's costs of the first petition being completed, application was made to *Tweed* and his co-Petitioners for payment of the amount as certified by the Taxing Master, but they refused to pay it on the ground that there was no one to give a proper discharge, whereupon the company's solicitors, Messrs. *Crook & Smith*, applied under Cons. Orders XL., rule 38, and XXVIII., rule 1, for a subpœna to recover the amount. The Record and Writ Clerk, however, hesitated to issue the subpœna, doubting whether, under the circumstances, he had power to do so.

Statement.

Oswald, on behalf of the company and their solicitors, now applied to his Lordship to direct a subpœna to be issued for the costs, submitting that they were in fact the costs of the solicitors: *In re General Exchange Bank* (1).

Argument.

JESSEL, M.R.:—

Judgment.

I will make an order as follows:—"Upon one of the firm of Messrs. *Crook & Smith* making an affidavit, to be produced to the Registrar, stating that the company have not paid them their costs, and that the costs are, in fact, still due to them, appoint one of that firm provisional liquidator—without salary or giving security—to receive the costs."

The provisional liquidator will thus have power, if necessary, to sue out a subpœna to recover the costs.

The provisional liquidator subsequently applied for and obtained a subpœna.

Solicitors: *Crook & Smith.*

(1) Law Rep. 4 Eq. 138.

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M. R.

1877

June 16.

In re NAGLE'S TRUSTS.

Practice—Petition—Confirmation of Sales Act (25 & 26 *Vict. c.* 108)—*Service on Remaindermen.*

A petition under 25 & 26 Vict. c. 108, s. 2, by trustees having power to sell settled lands with the consent of the tenant for life, for leave to sell the land and minerals separately, need not be served on the remaindermen.

In re Pryse's Estates (1) followed.

Statement.

THIS was a petition under the *Confirmation of Sales Act* (25 & 26 Vict. c. 108) by the trustees and tenant for life under a settlement of real estate—which contained a power for the trustees to sell with the consent of the tenant for life—for the sanction of the Court to enable the trustees to dispose of the land and minerals separately.

The petition had not been served on the persons entitled in remainder.

Argument.

E. S. Ford, for the Petitioners, submitted that service on the remaindermen was unnecessary, on the authority of Vice-Chancellor *Malins'* decision in *In re Pryse's Estates* (1).

Judgment.

JESSEL, M.R., made the order as prayed, and held, following Vice-Chancellor *Malins'* decision, that the petition need not be served on the remaindermen.

Solicitors: *Warry, Robins, & Burges.*

(1) Law Rep. 10 Eq. 531.

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In re SNELL (A SOLICITOR).

M. R.

1877

June 16.

Solicitor's Lien—Mortgage—Costs due from Mortgagor—Mortgagee's Title Deeds —Same Solicitor acting for both Parties.

A company having issued a debenture loan, a deed was prepared by their solicitor mortgaging their property to two of the directors as trustees for the debenture holders, the same solicitor acting also for the trustees. The mortgage contained a power of sale and the usual covenant against incumbrances. The company afterwards passed a resolution for a voluntary winding-up, whereupon the trustees acting under their power of sale contracted to sell the mortgaged property to a purchaser and applied to the solicitor for the company's title deeds, which were in his possession. He however refused to give them up, claiming a lien upon them for costs incurred by the company prior to the mortgage.

Upon a petition by the trustees and a debenture holder praying that the solicitor might be ordered to deliver up the title deeds to them:—

Held, that the solicitor was not entitled to a lien on the deeds, and that they must be delivered up to the Petitioners.

A solicitor acting for mortgagee as well as mortgagor in the preparation of a mortgage thereby loses his lien on the title deeds in his possession for costs due to him from the mortgagor, unless such lien is expressly reserved, even though the mortgagee may have known that the solicitor had such lien as against the mortgagor.

Statement.

THE directors of the *West Esgair Lle Mining Company, Limited*, having resolved to raise a sum of £2000 by debentures, instructed Mr. *Snell*, the company's solicitor, to prepare a trust deed for the purpose of securing to the debenture holders the repayment of the moneys to be advanced, together with interest thereon.

The deed was accordingly duly prepared and executed. It was dated the 31st of December, 1875, and was made between the company of the one part, and *Smith* and *Webb*, two of the directors, of the other part; and the mines belonging to the company and held by them under certain leases—one of which had been granted to the company by the Crown shortly before the execution of the present deed—were thereby assigned to *Smith* and *Webb* as trustees by way of mortgage for securing the repayment of the principal moneys and interest owing on the debentures. The deed contained a power of sale and the usual mortgage covenants for title, including a covenant against incumbrances.

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Statement.

Debentures to the amount of £1120 were taken up, each debenture stating that its repayment was secured by the trust deed.

In the preparation of the deed *Snell* acted as solicitor to the trustees as well as to the company. He also prepared the form of debenture and the copy of the trust deed which was placed in the company's office for the inspection of the debenture holders.

The company's leases and other title deeds recited in the trust deed were at the time of its execution and afterwards remained in *Snell's* possession.

In May, 1876, the company passed a resolution for a voluntary winding-up, and shortly afterwards the trustees, acting under the power of sale contained in the trust deed, contracted for the sale of the property comprised therein to a purchaser, whereupon the trustees applied to *Snell* for the title deeds, but he refused to deliver them up, claiming a lien upon them for costs due to him from the company and incurred by them prior to the execution of the deed. These costs included the costs of the solicitors to the Crown for completing the Crown lease to the company, the whole of these latter costs having been paid by *Snell* out of his own pocket. The costs of the trust deed had been paid by the trustees.

A petition was now presented by the trustees and one of the debenture holders, praying that *Snell* might be ordered to deliver up the title deeds to them forthwith.

Argument.

Chitty, Q.C., and *H. M. Williams*, for the Petitioners:—

Snell, having acted as our solicitor in the preparation of the mortgage, was bound to see our security perfected by the delivery to us of the title deeds, and he has no right now to derogate from the security which he himself prepared by withholding the deeds necessary to give effect to it: *Hicks* v. *Keate* (1). The mortgage deed contains no reservation of any lien for these costs, and moreover there is an express covenant against incumbrances.

Davey, Q.C., and *C. T. Mitchell*, for *Snell*:—

The mortgagees, being themselves two of the directors of the

(1) 3 Jur. 1024.

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company, must have been well aware that these costs had not been paid, and must therefore be taken to have had notice of the ordinary solicitor's lien for unpaid costs. It is true that the deed contains no express reservation of this lien, but the mortgagees, as directors of the company, could not have intended to prejudice their solicitor's security for his costs. It was in fact a debt for which they were bound to provide. This case differs from that of an ordinary mortgage in that there was no money passing through the solicitor's hands out of which he could discharge his lien, the title deeds being his only security. This is a very hard case, for if it should be held that we have no lien, we shall lose even our costs out of pocket.

M. R. 1877 *In re* SNELL (A SOLICITOR). Argument.

JESSEL, M.R.:— Judgment.

I cannot accede to Mr. *Snell's* argument. I have myself decided this point before, and my predecessor decided it more than once. It has in fact been decided several times, although the decisions do not appear to have been reported.

The point is this: Can a solicitor, who in the preparation of a mortgage acts both for mortgagor and mortgagee, claim a lien upon the title deeds for costs due to him from the mortgagor, so as to be entitled to withhold the deeds from his mortgagee client until payment of those costs?

Now, if a solicitor prepares a mortgage on behalf of a mortgagee, and acts for the mortgagee alone, he is of course bound to see that his client gets a proper security, an essential element of which is possession of the title deeds, and if he fails to see that his client has the deeds, he has neglected his duty towards that client.

If the solicitor chooses to act not only for the mortgagee but for the mortgagor also, he is still equally bound, as solicitor to the mortgagee, to see that his client obtains a good security, including possession of the deeds; and if he has a bill of costs against his mortgagor client, he, by acting for both parties, loses his lien upon the deeds, and holds them for his mortgagee client, unless his lien is expressly reserved. He cannot say to his mortgagee client, "I have been guilty of negligence; I do not hold the deeds on your

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M. R. 1877 *In re* SNELL (A SOLICITOR). Judgment.

account." He must be taken to have performed his duty, and to hold the deeds for his mortgagee client. That is his duty; and the fact that such client knew that he acted as solicitor for the mortgagor, and had a claim for costs against him, is therefore wholly immaterial. Moreover, the mortgagor, having authorized his solicitor to prepare the mortgage, has by so doing authorized him to act in a proper manner, that is, to do all necessary acts for the completion of the security, which of course includes handing over the title deeds. The solicitor requires no further instructions for that; he holds them as agent for the mortgagee client, and must therefore give them up to him when required to do so.

In an ordinary case the solicitor for a mortgagee never allows a single shilling to be provided by his client unless his client gets both the mortgage deed and the title deeds. It is, as I have said, his duty to see that his client gets the deeds.

It appears to me that *Snell* cannot be in a better position as regards these mortgagees than if he had acted as their solicitor alone. These deeds must therefore be delivered up to the Petitioners, who must also have their costs if they press for them.

Chitty said that under the circumstances he should not press for costs.

JESSEL, M.R.:—Then the order will be without costs.

Solicitors: *A. C. Spaull; F. W. Snell.*

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In re WESTERN OF CANADA OIL, LANDS, AND WORKS COMPANY.

M. R.
1877
June 15.

Practice—Examiners—Office—Right to exclude Agent of Parties—15 & 16 *Vict. c.* 86, *s.* 31.

The office of the examiner of the Court is not a public Court, and if the presence of the public is objected to the examiner has no discretion to admit them.

Where a clerk on commission of parties under examination before the examiner of the Court was himself interested in the case, and was to be subsequently called as a witness:—

Held, that he was not entitled to be present under 15 & 16 Vict. c. 86, s. 31, and that he ought properly to be excluded from the office.

Statement.

IN the winding-up of the *Western of Canada Oil, Lands, and Works Company, Limited*, a summons had been issued by the official liquidator under sect. 115 of the *Companies Act* to examine the members of the firm of *Carver, Ross, & Co.* On the 1st of June, 1877, the examination was commenced before the examiner of the Court, and Mr. *Ross*, one of the members of the firm, was examined. It then appeared from his examination that Mr. *Adams*, the clerk on commission of the firm, who was then present, was one of the persons principally concerned in the transaction to which the inquiry related.

At the next sitting, on the 8th of June, when Mr. *Carver*, the other member of the firm, was sworn, it was insisted on the part of the official liquidator that he should leave the room during the examination in consequence of what had transpired at the last examination, and because he might probably be himself summoned as a witness by the official liquidator. The counsel for Messrs. *Ross & Carver* contended that he ought not to be excluded, on the ground that his presence was necessary for the proper instruction of the solicitors and counsel during the examination, that he was not named in the summons directing the examination, and that he had been allowed to remain in the room during the former examination.

The examiner considered that, according to the *Companies Act*, 1862, and the usual practice, there was no ground for excluding

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M. R. 1877

In re WESTERN OF CANADA OIL, LANDS, AND WORKS COMPANY.

him. Thereupon the counsel for the official liquidator declined to proceed with the examination.

A motion was now made on behalf of the official liquidator that *Adams* might be excluded from attending the examination of Messrs. *Carver, Ross, & Co.*, and that such examination might be proceeded with.

Argument.

Roxburgh, Q.C., and *Whitehorne*, for the official liquidator, in support of the summons:—

The official liquidator had sufficient reason for applying for the exclusion of *Adams* during the examination of Messrs. *Ross & Carver*, as from what transpired on the former occasion when the examination took place, it appeared that he would probably be himself examined. Besides, he had no right to be present except by arrangement. In the case of *In re Merchants' Company* (1), Lord *Romilly* said that an official liquidator could, if he pleased, examine a witness *ex parte* on his own behalf before an examiner without any person being present. We submit that the examiner was wrong, and that the examination should proceed in the absence of *Adams*.

Davey, Q.C., and *Theodore Ribton*, for Messrs. *Carver, Ross, & Co.*:—

The examiner in this case has full discretion as to who may be allowed to be present during the examination. In *Wright* v. *Wilkin* (2) Vice-Chancellor *Kindersley* considered that a special examiner was himself the judge whether the examination should be carried on with closed doors or who should be admitted. The same may be said of the examiner of the Court. Besides, *Adams* was the agent of the witnesses who were under examination, and sect. 31 of the Act 15 & 16 Vict. c. 86, expressly provides that the examination shall take place "in the presence of the parties, their counsel, solicitors, or agents."

Judgment.

JESSEL, M.R.:—

The place where the examiner sits is not a public Court, but a mere office. That was so before the Judicature Acts, and those

(1) Law Rep. 4 Eq. 453, 457. (2) 6 W. R. 643.

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Acts, so far as I know, have made no change in his position, and his office remains a private office to this day.

The 31st section of the Act 15 & 16 Vict. c. 86, which is still in force for this purpose, provides that "all witnesses to be examined orally under the provisions of this Act shall be so examined by or before one of the examiners of the Court, or by or before an examiner to be specially appointed by the Court, . . . and such examination shall take place in the presence of the parties, their counsel, solicitors, or agents." That must mean in the presence of the parties, their counsel, solicitors, or agents exclusively. It cannot mean that the parties, their counsel, solicitors, or agents must be present. It can only mean that the examination shall take place in their presence if they choose to attend. Subject to this, it is a private examination.

In my opinion, the public have no right whatever to go into the examiner's office, and the examiner has no discretion as to admitting them.

An objection was made to the presence of this gentleman, who had no right to be present except as an agent of the parties. The word "agent" is rather an elastic term, but it is one the meaning of which is tolerably well settled in this Court. If Mr. *Adams* had merely been there in the capacity of an ordinary clerk employed to hand up papers he might have had a right to be present. But it turned out that he would in all probability be required as a witness, and the official liquidator did not want him to hear the evidence of his principals, and very properly objected to his presence. Therefore I think the examiner was in error in allowing him to remain, and there must be an order in the terms of the notice of motion. The liquidator will take his costs out of the estate.

Solicitors for Official Liquidator: *Lewis, Munns, & Longden.*
Solicitors for Respondents: *Fry & Hudson.*

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M. R.

1877

June 25.

In re HAMMERSMITH TOWN HALL COMPANY.

Company—Winding-up—Appointing Provisional Liquidator to protect Assets—Security.

The Court will, in case of urgency, appoint a provisional liquidator, without the consent of the company, to take possession of and protect the assets, upon his undertaking to give security forthwith, and producing an affidavit of fitness to the Registrar.

Statement. THE *Hammersmith Town Hall Company, Limited*, had sold a tavern forming part of their property, and the purchase was to be completed on the 28th of June. Their managing director had recently become bankrupt: several of their creditors were urgently pressing for payment, and a meeting of the shareholders had been convened for the 26th of June to confirm the sale of the tavern and to consider their affairs. A winding-up petition had been presented by creditors and was nearly ripe for hearing.

Under these circumstances—which were proved by affidavit—a motion was now made that Mr. *Daniels*, an accountant, might be appointed provisional liquidator to protect the company's assets.

Argument. *Ince*, Q.C., and *E. W. Bryne*, for the motion, referred to *In re Marseilles Extension Railway and Land Company* (before Vice-Chancellor *Malins*, Feb. 16, 1867).

The company had been served, but did not appear.

Judgment. JESSEL, M.R.:—

I will make an order appointing Mr. *Daniels* provisional liquidator to take possession of and protect the assets of the company, but not to distribute them until further order; he undertaking to give security forthwith. An affidavit of his fitness must also be produced to the Registrar.

Solicitors: *Lindo & Co.*

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WOOD AND IVERY, LIMITED, *v.* HAMBLET.

M. R.
1877
June 28.

[1877 W. 67.]

Practice—Action in Chancery Division—Order for sending Action for Trial at Assizes—Sufficient Reason—Rules of Court, 1875, *Order* XXXVI., *rr.* 3, 8—*Rules of Court, December*, 1876, *Order* XXXVI., *r.* 29*a*.

On an application by the Plaintiffs, with the concurrence of the Defendant, in an action in the Chancery Division for an order that the action might be tried at the *Staffordshire* Assizes:—

Held, having regard to Rules of Court, 1875, Order XXXVI., rules 3, 10, and Rules of Court, December, 1876, Order XXXVI., rule 29a, that an action as well as a question or issue therein might be ordered to be tried before the Commissioners of Assize; that, inasmuch as the parties desired it, as the action was for damages only, as it related to property in *Staffordshire*, and as there were a great many local witnesses, the order asked for should be made, and the above reasons stated on the face of the order as the reasons for which it was expedient that the action should be so tried.

Semble, the wish of the parties would not alone be a sufficient reason for making such an order.

West v. *White* (1) considered.

Statement.

THIS was a motion on behalf of the Plaintiffs, the Defendant consenting thereto, that this action might be tried at the ensuing assizes for *Staffordshire*, to be held at *Stafford*.

The action was commenced in the Chancery Division for the purpose of obtaining an injunction, and also for obtaining damages in respect of the alleged faulty construction of a cart-road across the site of a marl-pit, situate at *West Bromwich* in *Staffordshire*; but events had happened since the commencement of the action which reduced the question between the parties to one of damages only.

The Plaintiffs had joined issue in the action.

Argument.

Bardswell, in support of the motion:—

The Court has power to direct an action to be tried at the assizes as well as a question or issue of fact therein: Rules of Court, 1875, Order XXXVI., rule 8. Both parties wish this action to be sent down to *Staffordshire*, but perhaps that alone is not

(1) 4 Ch. D. 631.

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M. R. 1877 WOOD AND IVERY, LIMITED, v. HAMBLET. Argument.

sufficient to state on the order as "the reason for which it is expedient that the action, question, or issue should be tried at the assizes, and should not be tried in the Chancery Division," having regard to the provisions of the Rules of Court, December, 1876, Order XXXVI., rule 29a, although in *West* v. *White* (1) it seems to have been thought otherwise; but I submit that the order ought to be made for this further reason, that the action is a local action, in which the only question is one of damages, and there are a great many witnesses to be called, all of whom live in the neighbourhood.

Speed, for the Defendant.

Judgment.

JESSEL, M.R.:—

I have power to send down an action to the assizes as well as any question or issue of fact in an action. The mere desire of the parties that I should do so is not a sufficient reason why I should do it, having regard to the terms of Order XXXVI., rule 29a; but in this case I will make an order directing a trial at the *Staffordshire* assizes and not in the Chancery Division, because both sides desire it, because the action is one for damages only, because it relates to land in *Staffordshire*, and because there are a great many witnesses residing in the neighbourhood. These reasons must be stated in the order.

Solicitors for Plaintiffs: *Burton, Yeates, & Hart.*
Solicitors for Defendants: *Tucker & Lake.*

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In re EYKYN'S TRUSTS.

V.-C. M.
1877
June 15.

Husband and Wife—Investment in Three Names—Advancement for Wife—Trustee.

A. B. transferred certain railway debentures into the names of himself and his wife and a stranger who was one of the three trustees of his marriage settlement. He also transferred certain railway stock into the names of himself and his wife and two strangers, who were both trustees of the settlement:—

Held, that the two investments were neither intended as an augmentation of the settlement fund, nor were they to form part of his residuary estate, but were advancements for the benefit of the wife; and the strangers in each case were trustees for her upon her surviving her husband.

Statement.

THIS was a petition by *Georgina Charlotte Eykyn*, which stated that in July, 1851, *John Eykyn*, the husband of the Petitioner, invested a sum of £4000 in the purchase of debentures in the *Greenwich Railway Company*, in the names of himself, *John Eykyn*, his wife, and *Joseph Greenhill*, and about the same time he also purchased sixty shares of £20 each in the same company, which were transferred into the names of *John Eykyn*, his wife, *Thomas Eykyn*, and *Joseph Greenhill*. The interest upon the debentures and shares was received by *John Eykyn* during his life. By an indenture of settlement made on the marriage of *John Eykyn* with the Petitioner, dated the 20th of September, 1874, certain shares in public companies had been transferred to the trustees, *Joseph Greenhill*, *Thomas Eykyn*, and *John Holderness*, upon trust to pay the dividends and interest to the Petitioner for life, and afterwards upon trust for *John Eykyn* for his life, with remainder to the children of the marriage. The Petitioner believed that the debentures in the *Greenwich Railway* were intended by *John Eykyn* to be an addition to the settlement funds, and to be held upon the trusts thereof, and that the shares in the railway were intended by him to be the absolute property of the Petitioner. *John Eykyn* made his will on the 23rd of September, 1851, and thereby appointed the Petitioner and *Joseph Greenhill*, and his brothers *William* and *Thomas*

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V.-C. M. 1877 *In re* EYKYN'S TRUSTS.

Statement.

Eykyn, executors thereof, and he devised and bequeathed his real and personal estate to his executrix and executors in trust for the benefit of his wife for life, and afterwards for his children then living, and in default of issue for the benefit of his the testator's brothers and sisters and their issue living at the death of his wife.

John Eykyn died in September, 1858, and there was issue of the marriage one child only, namely, *John Henry Eykyn*, who attained the age of twenty-one in June, 1869.

In February, 1877, the debentures and shares were sold and the produce was paid into Court under the *Trustees Relief Act*. Up to that time the interest and dividends had been paid to and received by the Petitioner.

The petition prayed that it might be declared to whom the produce of the debentures and shares belonged.

Argument.

J. Pearson, Q.C., and *Freeman*, for the Petitioner, the widow of *John Eykyn*:—

We submit that the two investments made by Mr. *Eykyn* of £4000 railway debentures and sixty shares in the *Greenwich Railway* were intended as an advancement for the wife. The railway debentures were placed in the names of Mr. *Eykyn* and his wife and one of the trustees of his settlement. It is supposed by Mrs. *Eykyn* that this investment was intended as an augmentation of the fund included in the settlement upon her marriage on account of some portion of that fund having become reduced in amount, but there is no evidence of such being the husband's intention, and in opposition to this view there is the fact that only one of the trustees of the settlement was chosen as a transferee of the fund. The probability, therefore, is that an advancement for the wife absolutely was intended, and not an augmentation of the settlement fund. But under any circumstances it could not have been intended to form part of the general estate of Mr. *Eykyn*, or he would have added the names of the same persons whom he appointed trustees of his will. The second investment was in the names of Mr. *Eykyn* himself and of his wife and two trustees of his settlement. This falls within the same observation, and both funds must be considered as advancements for the wife.

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Everitt, for the only son of Mr. and Mrs. *Eykyn*, took no part in the argument, being content to leave the question to be decided by the Court.

Argument.

Glasse, Q.C., and *Millar*, for persons claiming under the will of *J. Eykyn*:—

There is no case deciding that where a fund is transferred into the names of a husband and wife and a stranger, the wife is to take the fund absolutely upon her surviving her husband. On the contrary, there are cases deciding that where a fund is transferred into the name of a wife it is intended only for convenience that the wife may be able to draw upon the fund, but it could not have been intended that she should have more than a life interest in the money, and in that case the residue after her death will fall into the general estate of Mr. *Eykyn*, and will pass by his will. In support of this view of the case we have *Marshal* v. *Crutwell* (1); *Lloyd* v. *Pughe* (2); *Fowkes* v. *Pascoe* (3); *Dummer* v. *Pitcher* (4).

Judgment.

MALINS, V.C.:—

This case is peculiar in this respect, that it is the first case in which similar circumstances have occurred. Transactions of this kind have often taken place where a person has invested money in the names of himself and his wife, but the introduction of the name of a stranger has never, I believe, been brought in question before the Courts. It does not appear what reason Mr. *Eykyn* had for making these particular investments. The original amount comprised in his marriage settlement produced a sum of £600 per annum, and that amount having been reduced by about £150, Mrs. *Eykyn* believed that one of the investments was intended to augment the settlement fund and raise it to the original amount. Whether that was his intention or not there is no evidence of anything said or done by *J. Eykyn* to establish the belief entertained by Mrs. *Eykyn*, and the case must be decided independently of any evidence of intention.

(1) Law Rep. 20 Eq. 328.
(2) Law Rep. 14 Eq. 241; reversed on appeal, Law Rep. 8 Ch. 88.
(3) Law Rep. 10 Ch. 343.
(4) 2 My. & K. 262.

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V.-C. M. 1877 *In re* EYKYN'S TRUSTS. Judgment.

It appears, then, that the railway debentures which were first purchased were placed in the names of *J. Eykyn*, his wife, and *Joseph Greenhill*, who was also one of the trustees of the settlement, and the sixty shares subsequently purchased were transferred into the names of *J. Eykyn* and his wife, and *Thomas Eykyn* and *Joseph Greenhill*, the two last being both trustees of the settlement. These transactions took place in 1851, and no question was raised about them till very recently. Now, the question arises whether the property so purchased is to be considered as part of the general estate of *J. Eykyn*, or whether it belongs to Mrs. *Eykyn*, the Petitioner, or whether it is to be held to form part of the trust funds settled upon the marriage of Mr. and Mrs. *Eykyn*. If the funds formed part of the general estate, then they passed by the will of *J. Eykyn* to Mrs. *Eykyn* as tenant for life, and afterwards to her son, if he shall be then living, and if he shall be then dead without issue it is to go over to collateral relatives who are Respondents to this petition.

I am now called upon to decide the effect of the transactions *per se*, there being no evidence of anything said or done which can prove anything one way or the other. The law of this Court is perfectly settled that when a husband transfers money or other property into the name of his wife only, then the presumption is, that it is intended as a gift or advancement to the wife absolutely at once, subject to such marital control as he may exercise. And if a husband invests money, stock, or otherwise, in the names of himself and his wife, then also it is an advancement for the benefit of the wife absolutely if she survives her husband, but if he survives her, then it reverts to him as joint tenant with his wife. This principle is established by the authority of *Dummer* v. *Pitcher* (1), and cannot now be disputed. Therefore, if this stock had been put into the name of Mrs. *Eykyn* alone, the result would have been that the law would presume that an advancement or provision for the wife was the object of the husband, unless there was evidence to rebut the presumption.

But what are the facts? As regards the £1000 of debentures they were put in the names of three persons, Mr. *Eykyn* himself, his wife, and *Joseph Greenhill*. In those names the stock remained

(1) 2 My. & K. 262.

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up to the time when it was sold in order to be paid into Court. Now, what is the position of *Joseph Greenhill?* He paid nothing in respect of this investment, and he must necessarily be a trustee for some one. Was he, then, trustee for Mrs. *Eykyn* or Mr. *Eykyn?*

I confess, on principle, it seems to me when a man transfers money into the name of his wife, that must be intended as an advancement, and not less so because he places it in the name also of another person. I think the wife becomes absolutely entitled, and the other person must be intended as a trustee for her. What was the object of this transaction? *J. Eykyn* made his will in September, 1851, and he does not place the stock in the names of the persons whom he appointed executors, as he might have been expected to do if he intended it to form part of his general estate, but he inserts the name of *Joseph Greenhill* only. I can only say that I think what he intended must have been this: "I do not want this to go to my wife if she should die in my lifetime; but if I die first then I will put in another name, because *Joseph Greenhill* in that case will hold the stock as trustee for her, or if I should survive my wife then he will be a trustee for me." What other object could he have had? Mrs. *Eykyn* is under the belief that this investment was intended as an augmentation of the fund comprised in the settlement, because that fund had been reduced to a less amount than it originally produced, and this was intended to make the settlement fund up to what it was at first; but the Court must look at the nature of the transaction in the absence of any evidence to explain what was the intention of Mr. *Eykyn*, and must treat it as independent of any evidence. Then, in my opinion, the object was to augment the means that the widow was to have if she survived her husband.

Although the question is open to this observation, that it has never yet been decided that where money is transferred into the names of the wife and another person, it is an advancement, still, on the other hand, there is no decision to the contrary, there being in fact no judicial decision whatever upon the subject. In my opinion there is no difference whether it is in the name of the husband and wife, or the husband, the wife, and a third person, except that the third person must be a trustee for the survivor.

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V.-C. M. 1877 *In re* EYKYN'S TRUSTS. Judgment.

Therefore, in this case, the wife being the survivor, Mr. *Greenhill* is a trustee for her. In other words, it is in the nature of an advancement for the wife.

On another ground, I think, it could not have been intended as an augmentation of the settlement fund, because it must have been perfectly well known to Mr. *Eykyn* who were the trustees of his settlement, and if it had been his intention to augment that fund he would have introduced the names of the three gentlemen who were the trustees of the settlement.

Then with regard to the sixty shares in the railway, they were transferred into the names of Mr. *Eykyn* and his wife and of *Thomas Eykyn* and *Joseph Greenhill*, and these gentlemen were two of the three trustees of the settlement. Mr. *Eykyn*, of course, knew that Mr. *Holderness* was also one of the trustees of the settlement, and if he had intended to augment the settlement fund he would in that case have introduced the names of all three trustees, therefore I think with regard to this investment it stands in the same position as the £4000 debentures, and was an advancement or additional provision for the widow; and the two gentlemen, Mr. *Thomas Eykyn* and Mr. *Greenhill*, were to be trustees for her if she survived. As to this investment, the Petitioner does not say she believes that it was intended as an augmentation of the settlement fund, but as a provision for herself; but in my opinion both cases rest upon the same principle, and whether money is placed in the names of a husband and wife only, or whether third persons are added, it makes no difference, except that the third persons are trustees for the survivor, and it is just the same as if it stood in the name of the wife only.

The old doctrine of the Courts of Law was that where a man transferred a fund into the names of himself, his wife, and a third person, all three were joint tenants of the fund, but if the third person is a stranger, and is a person who has not contributed towards the investment, then if he survives the one who is capable of taking by way of advancement, he would, in the eyes of this Court, have no interest, because he would be incapable of taking. That doctrine would equally apply to both these cases.

I think, on the whole, it is clear that Mr. *Eykyn* had no object

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in these transactions except that of making an extra provision for his widow.

Then as to the authorities. The transactions in the case of *Marshal* v. *Crutwell* (1) were of a totally different nature. There the husband, who was in failing health, transferred his banking account into the names of himself and his wife for the purpose of enabling his wife to draw cheques and to manage his affairs when he was incapable of doing so himself, and the Master of the Rolls came to the conclusion that it was merely done as a mode of conveniently managing the husband's affairs. The case of *Fowkes* v. *Pascoe* (2) went to the whole length of what I am now deciding.

Lloyd v. *Pughe* (3) was a case differing entirely from the present, because there the wife was executrix of her father and paid the money she received as such executrix into an account in her own name. The property belonged to the wife, and the husband paid money of his own to the same account, which was not paid by way of advancement, but for convenience. There was nothing in that case to interfere with what I am deciding in this case, which is upon the broad principle that a transaction of this kind, where there is no evidence to explain what the intention was, must be taken to be for the benefit of the wife, whether the money is placed in the names of the husband and wife, or in the names of the husband and wife and a stranger, in which case the stranger becomes a trustee for the wife upon her surviving the husband.

The decree must therefore be—The Court being of opinion that the two sums so invested were not intended as an augmentation of the settlement fund, but as an advancement for the benefit of the wife, let the amount be paid over to her.

Solicitors: *Hughes & Beadles; Rivington & Son.*

(1) Law Rep. 20 Eq. 328. (2) Law Rep. 10 Ch. 343.
(3) Law Rep. 14 Eq. 341; Ibid. 8 Ch. 88.

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V.-C. M.
1877
June 26.

EVERETT *v.* EVERETT.

[1874 E. 33.]

Wills Act (1 *Vict. c.* 26)—*Advances made after Date of Will—Will speaking from the Date.*

A testator, after reciting that he had advanced to his son various sums of money, and that he was desirous that his son should be released from the said several sums, and that the securities held in respect thereof should be given up to him, bequeathed to his son all the aforesaid several sums, with the securities then in the testator's hands relating thereto, and he released him from payment of all such sums:—

Held, that the will must be construed as speaking from the date and not from the death in respect of the advances made by the testator; and that the son was not released from the payment of money advanced between the date of the will and the death of the testator.

Statement.

THE will of *William Everett*, dated the 22nd of March, 1872, which disposed of considerable property, contained the following clause: "And whereas by a certain memorandum of deposit my said son *Frederick Everett* deposited with me two several bonds of one *Henry Elton* to secure to me a certain sum of money lent and advanced by me to him: And whereas I have since caused such bonds to be cancelled: And whereas I have lent and advanced to my said son various other sums of money, and he is now indebted to me in divers sums of money in respect thereof: And whereas I am desirous that he, his executors and administrators, shall be discharged and released from the said several hereinbefore mentioned sums of money, and that neither he nor they should be required to pay the same or any part thereof to my said estate, that the several securities now held by me in respect of the said several last-mentioned moneys should be restored and given up to him, or in the event of his dying before me, then to his executors or administrators for the benefit of his estate, subject as hereinafter mentioned: Now I do hereby give and bequeath unto my said son *Frederick*, and if he should predecease me, then to his executors or administrators for the benefit of his estate, all and several the aforesaid several moneys, together with the several paintings, policy, bonds, goods and chattels, and all other the

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effects now in my custody, possession, or power relating thereto." And after giving directions as to a particular debt due from a person named *Elton*, the testator continued, "And I release my said son, his executors and administrators, from all claims and demands in respect of the aforesaid moneys, goods, chattels, and effects, and all other moneys due from him to me, and I desire my executors to do and execute all acts and deeds (if any) which may be necessary or proper for confirming and effectuating such release."

Statement.

The testator died on the 11th of May, 1874. After the date of the will he had made further advances to his son *Frederick*, and a question was now raised whether those sums were intended by the testator to be released.

Argument.

Glasse, Q.C., and *Nalder*, for the personal representatives of the testator:—

The will in this case must be held as speaking from the date. The testator refers to particular sums owing to him by the son at that period, and he could not have intended to release any subsequent debt that might be contracted: *Douglas* v. *Douglas* (1); *Doe* v. *Walker* (2); *Castle* v. *Fox* (3).

J. Pearson, Q.C., and *Hunter*, for persons in the same interest.

Higgins, Q.C., and *Maidlow*, for Mrs. *Everett* and her children.

Karslake, Q.C., and *Whitaker*, for the testator's son:—

By the 24th section of the *Wills Act* the will is to speak from the day of the death, consequently all sums due to the testator by the son up to that period must be included in the release to the son.

Judgment.

MALINS, V.C.:—

I am sorry to say that I cannot come to the conclusion urged by Mr. *Karslake*. There is no doubt that the law has been very much altered as to the date at which a will is to speak, because

(1) Kay, 400. (2) 12 M. & W. 591.
(3) Law Rep. 11 Eq. 542.

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V.-C. M. 1877 EVERETT v. EVERETT. Judgment.

the 24th section of the *Wills Act* enacts "That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intention shall appear by the will." Therefore, if a man says, "I bequeath all my lands," that, by the very terms, means all the lands he had at the time of his death—all his personal estate, or all his stock of a particular denomination—all that speaks immediately before the death of the testator, and consequently will pass not only all stock that he had at the time of making his will, but all that he acquired between the time of making his will and his own death. But if a man says, I give a particular thing—I give a cup and saucer—you cannot have anything more; you cannot pass the cream-jug; and if he says, therefore, I give a particular thing, that shews a contrary intention, and only the particular thing named can pass.

In this case the testator recites by his will, made in 1872, that he had made certain advances to his son, and he recites his desire that his son should be released from "the said several hereinbefore mentioned sums of money," "and that the several securities now held by me in respect of the said several last-mentioned moneys should be restored and given up to him, or in the event of his dying before me, then to his executors or administrators." It is evident, therefore, he is directing his attention to a debt then in existence which his son had contracted to him, and which he then owed. Then he says, "Now I do hereby give and bequeath unto my said son *Frederick*, and if he should predecease me, then to his executors or administrators for the benefit of his estate, all and several the aforesaid several moneys;" that is, including the several sums of money which *Frederick* then owed him. Suppose he had said, "I give to my son *John* the sum which *Frederick* now owes me," it would be a specific bequest of the debt which *Frederick* owed him, not at the time of his death—it is not a question of what passes by general bequest—but what *Frederick* owes me I give to *John*. Instead of giving it to *John* he gives it to *Frederick* himself. What does he give? He gives the debt which *Frederick* then owes. Then he proceeds, "And I release my said son, his executors or administrators, from all claims and

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demands in respect of the aforesaid moneys, goods, chattels, and effects, and all other moneys due from him to me," that is, now due from him to me. He does not, as he might well have said, "all sums which are now due from him to me, or which may be due from him to me at the time of my death," but he expressly confines it, "due from him to me." Let us look at the reason of the thing. A man may have advanced to his son, say £5000, at the date of his will; he lives many years after the date of his will, and he advances to his son, or, it may be, to a stranger, a large sum of money afterwards, it might very reasonably have been his intention to release the debt which had been contracted when he made his will, but there is no reason for saying that it necessarily releases everything which the person may owe him perhaps many years afterwards. Every reason is against it. Although for many purposes a will must undoubtedly, as pointed out by the *Wills Act*, for the purpose of passing real and personal estate, speak and take effect as if it had been executed immediately before the death of the testator, it does not for other purposes speak from that date, but it speaks from the time when it was made. Therefore I cannot attribute to this testator an intention to do more than his will does, namely, to release his son or to give to his son, call it which you like, all sums of money which he at that time owed him. It appears that they are not very large sums, only £200 and £150. I can find no words in the will shewing that he intended to forgive the son all the debts which at any time he should owe him. Therefore it seems to me that for this purpose, as for many other purposes, the will must be considered as speaking, not from the death of the testator, but from its date. It has been held if a man says, I give to my wife such a gift, and he has one wife when the will is made and he has another wife when he dies, that the gift applies to the wife he had when the will was made, and not to the wife he had afterwards. That has been thoroughly settled. So, for many purposes, the will must necessarily speak from the date, although it is most advantageous and for the interest of all parties, for the purpose of passing the property which the testator acquires between the date of his will and his death, that it should speak from the latter date only. As to authorities, I should have expected that Mr. *Karslake*

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would have been able to cite some authority in support of his contention. However, he has not cited one. Mr. *Glasse* mentioned to me the only case which appears to apply to it, viz., the case of *Douglas* v. *Douglas* (1), which I think completely governs my decision in this case. There there was a gift of certain moneys which the testator had advanced to his sister for the purpose of improving the Scotch estate, and which were secured upon the Scotch estate. Did the will speak from its date or from the death? If the first, it would not apply to all subsequent moneys advanced on the Scotch estate, although the subsequent advances after the date of the will were as much secured upon the Scotch estate as those made before. When a person speaks of giving certain sums of money to a particular individual, say to a son, I can only regard it as being the sums of money when the instrument was executed, that is the date of the will. These things are very common. I have seen many cases in which a testator was desirous of releasing a debt owing to him, when he adds these words, "And I hereby release my children from all debts which they now owe me, or which they may hereafter owe me." In the absence of any authority which has been found in favour of the view I take, except the case of *Douglas* v. *Douglas*, upon principle as well as upon authority, I come to the conclusion that the will could only release the debt which the son owed him at the date of the will. Therefore the two sums of £200 and £150 will form part of the residue, and as it appears from the Chief Clerk's certificate that those sums are outstanding in the hands of *Frederick Everett*, secured upon certain securities in the hands of the executors, the proper course will be to order him within a reasonable time to pay the money to the executors, who will hand back the securities given for them.

Solicitors: *Collyer-Bristow, Withers, & Russell; H. B. Poole.*

(1) Kay, 400.

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In re MELLOR'S POLICY TRUSTS.

V.-C. M.
1877
July 13.

Married Women's Property Act (33 & 34 *Vict. c.* 93), *s.* 10—*Policy of Insurance —Form of Order—Declaration of Trusts.*

W. M., deceased, in his lifetime effected a policy of insurance under the *Married Women's Property Act*, s. 10, for the benefit of his wife and children or child, but the interest they were to take was not expressed upon the face of the policy.

The Court, upon an application under the 10th section of the Act for the appointment of trustees to receive the moneys due under the policy, declared the rights and interests therein of the wife and children of the deceased, and directed the fund to be settled upon the usual trusts of a settlement.

Statement.

WILLIAM MELLOR, deceased, by a policy of assurance in the *Eagle Insurance Company*, dated the 29th of July, 1874, effected an assurance upon his own life for the sum of £400. The policy contained a recital that the assured had proposed to effect an assurance with the company upon his own life for the benefit of any wife, and also of any children or child, who might survive him, and by the policy the capital, stock, and funds of the company were charged with and made liable to pay to such person as should be competent or entitled to give a good receipt and discharge for the same under the provisions of the *Married Women's Property Act*, 1870, within three calendar months after proof satisfactory to the directors of the company should have been given of the death of the assured, for the benefit of his wife and children or child, the full sum of £400, together with all other moneys payable thereunder, and all benefit thereof. The interests to be taken by the wife and children of the assured in the moneys payable under the policy were not further or otherwise expressed upon the face of the policy.

The assured died on the 20th of April, 1877, leaving a widow and two children (daughters) surviving, and having made his will, dated the 12th of April, 1877, whereby he gave all his property to his widow absolutely, and appointed her one of the executors. The will was duly proved by the widow alone. The widow and

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V.-C. M. 1877 — *In re* MELLOR'S POLICY TRUSTS.

the two children now petitioned the Court to appoint (by virtue of the power given by section 10 of the *Married Women's Property Act*, 1870) trustees of the policy to receive the moneys payable thereunder; they also prayed that their rights and interests in the said moneys might be declared by the Court.

Argument.

Oswald, for the Petitioners:—

The 10th section of the Act states that the policy shall enure and be deemed a trust for the benefit of the wife for her separate use, and of the children or any of them according to the interests so expressed, viz., upon the face of the policy. But here no interest is expressed upon the face of the policy: all that is expressed is that the moneys are to be for the benefit of the wife and children or child. The Court is therefore asked to declare the rights and interests of the Petitioners in the moneys. In *Sanderson* v. *Sanderson* (8th June, 1877) your Lordship ordered compensation for damages, paid under *Lord Campbell's Act*, to be distributed among the wife and children of a deceased who had died intestate according to the provisions of the *Statute of Distributions* as in the case of an intestacy, and I submit that the moneys secured by this policy must either be so divided or else held for the benefit of the wife for life, with remainder for the benefit of the children, according to the usual trusts of a settlement.

Judgment.

MALINS, V.C.:—

The money cannot be distributed as in the case of an intestacy, because the words of the Act are that it is to be deemed a trust for the wife for her separate use. The money must therefore be held by the trustees, when appointed, upon trust for the wife for life, with remainder to the children, according to the usual trusts of a settlement. The order will be to appoint two persons trustees to receive the moneys under the 10th section of the Act, and declare that they are to hold the moneys when received upon trust to pay thereout the costs (to be taxed as between solicitors and clients) of and incident to the application, and to invest the residue in securities authorized by the Court (to include *India* 4 per Cents), and to pay the income to the widow for life for her

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separate use without power of anticipation, with remainder (as to both capital and income) for the two children on attaining twenty-one or marriage under that age, in equal shares, and if but one, the whole to that one, with remainder (as to both capital and income), if neither child attain twenty-one or marry under that age, for the widow absolutely.

Solicitors: *Layton & Jaques.*

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V.-C. B.
1877
June 7.

BAGNALL *v.* CARLTON.

[1875 B. 224.]

Charging Order—Debitum in præsenti solvendum in futuro.

Upon judgment in an action declaring that the Defendant is liable to pay to the Plaintiff a certain sum, and decreeing payment to be made on or before that day three months, the Plaintiff is at once entitled, under 1 & 2 Vict. c. 110, s. 14, to obtain a charging order upon stock and shares standing in the name of the Defendant.

Statement.

MOTION on behalf of the Defendant, *Albert Grant*, to discharge an order *nisi* of the 19th of May, 1877, charging a sum of £10,000 deferred stock of the *Bristol Port, &c., Company*, and all other stock or shares of the same company standing in the names of the Defendants *Albert* and *Maurice Grant*, or of *G. S. Lloyd* and *Timothy Kenrick*, or either of them, in the books of the company, with payment of the sum of £85,000 and interest, by the judgment in this cause, on the 25th of April, 1877, ordered to be paid by the Defendants *Albert Grant* and *James Carlton*.

By the judgment of the Vice-Chancellor on the 25th of April, 1877, it was declared that the Defendants *James Carlton* and *Albert Grant* were jointly and severally liable to pay to the Plaintiffs the sum of £85,000, with interest thereon at 4 per cent. per annum from the 26th of April, 1873, until payment, and the decree ordered payment to be made on or before the 25th of July, 1877.

The Defendants *Albert* and *Maurice Grant*, who carried on business in partnership as bankers at 24, *Lombard Street*, were in June, 1876, interested in a sum of £10,000 deferred stock of the *Bristol Ports Channel Dock Company*, standing in the names of *Sampson Lloyd* and *Timothy Kenrick* in the books of the company.

On the 19th of May, 1877, the Plaintiffs obtained an order *nisi* under 1 & 2 Vict. c. 110, charging the stock in question with payment of the £85,000 and interest, and the usual injunction restraining the company and the Defendants, in whose name the stock was standing, from permitting or making any transfer of

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the stock in the meantime, and until the order should be made absolute or should be discharged.

The Defendant *Albert Grant* now moved to discharge this order.

Sir *H. Jackson*, Q.C., and *Everitt*, in support of the motion:—

A judgment creditor is not entitled to a charging order before the time at which the money has become actually payable. In this case no sum is now payable, there being only a declaration that a particular sum is payable on the 25th of July, 1877, and a decree for payment on that day.

The intention of 1 & 2 Vict. c. 110, s. 14, as appears by the preamble to sect. 11, is to give to a charging order the same effect, and to place the judgment creditor in the same position exactly as if the judgment debtor had given him a charge or mortgage under his hand to secure the debt which has already become payable. But it could not have been intended to give a judgment creditor any right to put his remedy in force prospectively. The charging order, which when made absolute relates back and operates from the making of the order *nisi: Haly* v. *Barry* (1), by attaching and locking up the property of the debtor, might put it out of his power to comply with the order of the Court for payment of the £85,000.

Kay, Q.C., and *Russell Roberts*, for the Plaintiffs:—

The effect of a judgment, which by 1 & 2 Vict. c. 110, s. 18, is extended to all decrees or orders of Courts of Equity, is to create *debitum in præsenti solvendum in futuro*. By 1 & 2 Vict. c. 110, s. 13, it operates as a charge upon all lands and other property of or to which the person against whom judgment has been entered up shall at the time be seised or entitled, and by sect. 14 the judgment creditor is enabled to obtain an order charging stock and shares in the public funds and public companies belonging to the debtor, and this charging order may be obtained although the judgment debt is not actually payable until a future day: *Younghusband* v. *Gisborne* (2); and in order to secure an amount of costs before they have been actually taxed: *Burns* v. *Irving* (3). By

(1) Law Rep. 3 Ch. 452. (2) 1 De G. & Sm. 209.
(3) 3 Ch. D. 291.

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V.-C. B. 1877 BAGNALL v. CARLTON. Argument.

granting this motion the Defendant would have the opportunity of defeating the decree by making away with this property in the meantime.

Sir *H. Jackson*, in reply.

Some discussion took place as to the form of the order, and *Seton* (1) was referred to as shewing that the injunction was not continued after the order was made absolute.

Judgment.

BACON, V.C.:—

I entertain no doubt on this question. When the words of the statute [to which his Lordship referred] are considered, to say that it was the intention of the Legislature, after an order had been made for payment, that the debtor should be allowed in the meantime to do what he pleased with property which, in the eye of the law, was the property of the creditor, would, in my opinion, be against the plain enactment of the Act of Parliament, and nothing could be more opposed to common sense. I think the matter too plain for discussion, and that there is no ground for this application. *Younghusband* v. *Gisborne* (2) is a plain authority that there may be a charging order in respect of a judgment debt made payable on a future day. In this case a delay of three months was given in order to allow time for an appeal. The charging order was perfectly right, and in all respects consistent with common sense, and must be made absolute against the Defendant *Grant*, whose motion is refused with costs.

Solicitors: *Tucker & Lake; Ashurst, Morris, Crisp, & Co.*

(1) 4th Ed. vol. i. pp. 305, 306. (2) 1 De G. & Sm. 209.

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In re REDFERN.
REDFERN *v.* BRYNING.

V.-C. B.
1877
July 21.

[1877 R. 70.]

Will—Construction—Omission in Will supplied by Inference.

Testator, having two sons and five daughters, by his will directed the residue of his real and personal estates to be divided, as a mixed fund, into sevenths, and bequeathed one seventh to one son, and another to the other son. He then bequeathed "the remaining five sevenths" upon trust during the respective lives of his daughters, *Elizabeth*, *Sarah*, *Eliza*, *Mary*, and *Hannah*, to invest and pay the income into the proper and respective hands of his said daughters (again naming them) in equal shares for their separate use. He then, from and after the death of *Elizabeth*, gave one fifth of the fund to the children of *Elizabeth*; from and after the death of *Sarah*, another fifth to the children of *Sarah*; from and after the death of *Eliza*, another fifth to the children (not of *Eliza*, but) of *Mary*; and from and after the death of *Hannah*, another fifth to the children of *Hannah*. He further gave directions, until the "part or share of the said trust-moneys of the issue of any of my said daughters" should become payable, to apply the same by way of maintenance.

The Court, holding that a clause giving to the children of *Eliza* an interest in one fifth of the trust fund similar to that which was given to the children of the other four daughters, and giving the children of *Mary* a like interest on the death not of *Eliza* but of *Mary*, had been accidentally omitted, declared that the will must be read as if it contained the omitted clause.

MOTION FOR JUDGMENT.

Statement.

Thomas Redfern died on the 28th of July, 1854, having by will, dated the 20th of April, 1854, devised to trustees all his real and personal estate whatsoever and wheresoever, upon trust to sell and convert, and stand possessed of the residue upon trust as to one seventh part thereof for his son *Joseph* absolutely; and as to another seventh for his son *Thomas* absolutely. As to the remaining five sevenths testator directed his trustees, "during the respective lives of my daughters, *Elizabeth*, now the wife of *Richard Kirkham*, *Sarah*, *Eliza* now the wife of *John Bramall*, *Mary*, and *Hannah*," to invest the same as therein mentioned, and "during the respective lives of my daughters" to pay the income of the securities as the same should arise "into the proper and respective hands of my said daughters, *Elizabeth*, *Sarah*, *Eliza*, *Mary*, and

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V.-C. B. 1877 *In re* REDFERN. REDFERN v. BRYNING.

Statement.

Hannah, in equal shares," or as they respectively should appoint, "for the sole and separate uses of my said daughters *Elizabeth*, *Sarah*, *Eliza*, *Mary*, and *Hannah* respectively." Testator then proceeded as follows, with the exception of the clause in brackets, which it was suggested had been accidentally omitted, and which the claim asked that the Court should supply:—

"And from and immediately after the decease of my said daughter *Elizabeth*, they my said trustees or trustee do and shall stand possessed of and interested in the said trust moneys, stocks, funds, and securities, upon trust as to one equal fifth part or share thereof for all and every the children of my said daughter *Elizabeth*, if more than one, in equal shares and proportions as tenants in common; and if there shall be but one such child, then upon trust for such only child, for their, his, and their absolute use and benefit. And from and immediately after the decease of my said daughter *Sarah*, as to another equal fifth part or share of the said trust moneys upon trust for all and every the child and children of my said daughter *Sarah*, if more than one, in equal shares and proportions as tenants in common; and if there shall be but one such child, then upon trust for such only child, for their, his, and her absolute use and benefit. And from and immediately after the decease of my said daughter *Eliza*," [then as to another equal fifth part or share of the said trust moneys upon trust for all and every the child and children of my said daughter *Eliza*, if more than one, in equal shares and proportions as tenants in common; and if there shall be but one such child, then upon trust for such only child, for their, his, and her absolute use and benefit. And from and immediately after the decease of my said daughter *Mary*,] "then as to another equal fifth part or share of the said trust moneys, upon trust for all and every the child and children of my said daughter *Mary*, if more than one, in equal shares and proportions as tenants in common; and if there shall be but one such child, then upon trust for such only child, for their, his, and her absolute use and benefit. And from and immediately after the decease of my said daughter *Hannah*, then as to another equal fifth part or share of the said trust moneys, upon trust for all and every the child and children of my said daughter *Hannah*, if more than one, in equal shares and proportions as tenants in

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common, and if there shall be but one such child, then upon trust for such only child, for their, his, and her own use and benefit."

Testator then gave a direction as to the destination of the rents of the real estate until sale; and proceeded thus:—"Provided always, and I do hereby will and direct, that it shall be lawful for my said trustees or trustee in the meantime, until the legacy or legacies, part or share of the said trust moneys of the issue of any of my said daughters, shall become payable by virtue of this my will, to lay out and invest the same in their or his own names or name in the securities aforesaid, or any of them; and from time to time to alter, vary, and transfer the same for or into other securities of a like nature when and as often as they or he shall think fit, the legacy or legacies, part or share of such issue, or any of them, and to pay or apply the interest, dividends, stocks, funds, and annual produce thereof, or a competent part thereof, according to the discretion of the trustees or trustee, in the maintenance, education, and bringing up of such issue."

Statement.

The writ was issued by the trustees of the will against the heir-at-law and next of kin, the children (three) of testator's daughter *Eliza*, and the child of *Mary*, claiming a declaration who, according to the construction and in the events which had happened, were entitled to the share given to the testator's daughter *Eliza* for life; and the statement of claim alleged that the will must be read and construed as if the words in brackets above were contained in the will, and claimed a declaration accordingly.

The Defendants, representing the heir-at-law and next of kin, stated in defence that they believed there must have been some accidental omission in drawing or copying the will, and that the presumable intention of the testator was such as was expressed in the statement of claim; and they submitted; but as some of the persons claiming under the heir-at-law were infants, they were unable to consent.

Ingle Joyce, for the Plaintiffs.

Argument.

Grosvenor Woods, for the first Defendants, representing the heir-at-law and next of kin.

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V.-C. B.

1877

In re REDFERN. REDFERN v. BRYNING.

Argument.

Sir *H. Jackson*, Q.C., and *Procter*, for *Eliza's* children:—

The intention to provide for the children of all the daughters alike is sufficiently apparent from the maintenance clause; and is borne out by the language in other parts of the will. The Court has jurisdiction to supply an omission arising from accident: *Sweeting* v. *Prideaux* (1). The case of *In re Daniel's Settlement Trusts* (2) was stronger, being that of a deed. The latest authority is *Greenwood* v. *Greenwood* (3).

Kay, Q.C., and *Finch*, for the child of *Mary*.

Judgment.

BACON, V.C.:—

This is one of those difficult tasks which the construction of wills imposes on the Court, but there is a great deal of authority and guidance which enable the Court to discharge that duty with reasonable satisfaction.

Now, no doubt the mere letter of the will, or any other instrument, is not to be adhered to if a contrary signification can be suggested by the whole context of the instrument. The spirit is to prevail, and the letter is not to be allowed to kill. That I take to be a plain, clear canon of construction. There is the other rule which the Court always acts upon, namely, not to impute to a testator the intention of dying intestate.

Then there is no decision, that I know of, adverse to the contention of Sir *Henry Jackson*, other than the decision of the Master of the Rolls in *In re Daniel's Settlement Trusts*, which was reversed on appeal. Therefore, it cannot be said that it is in the way of the construction I am called upon by Sir *Henry Jackson* to put upon the will in this case. There is not any case that can be referred to, that I know of, in which the mere letter has been allowed to prevail over the plain sense of the instrument.

Now, the testator in this case, having seven children to provide for, makes an equal division of all his estate among those seven children. That is the plain meaning and intention of the will. To his two sons he gives shares without any limitation, and as to the daughters he seems to have carefully provided that the income

(1) 2 Ch. D. 413. (2) 1 Ch. D. 375.
(3) 5 Ch. D. 954.

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shall be only theirs during their lives, and that the enjoyment of the income shall be protected against the marital influence, and then, having first given to his daughters interests for life in equal shares, he provides that, upon their death, their children shall succeed to their shares. That is the general scope and intention of the will. Then, having provided for the children of two of his daughters, *Elizabeth* and *Sarah*, when he comes to his third daughter, *Eliza*, he expresses himself (that is to say, he is made to express himself) thus: "and from and immediately after the decease of my said daughter *Eliza* then as to another equal fifth part or share of the said trust moneys upon trust for all and every the child and children of my said daughter *Mary*." There is no reason that can be suggested for that; and if that is to prevail, then the testator dies intestate as to the interest which he meant, or I assume he meant, *Eliza's* children to take after the death of their mother. Can I impute any such intention to the testator on reading the whole of this will? and can I, with propriety, do so when I look especially to that provision for the maintenance of the infant children after the death of their mother, which is expressed in these words?—"I direct that it shall be lawful for my said trustees or trustee in the meantime until the legacy or legacies, part or share of the said trust moneys of the issue of any of my said daughters, shall become payable by virtue of this my will, to lay out and invest the same in their or his own names or name in the securities aforesaid, or any of them, and from time to time to alter, vary, and transfer the same for or into other securities of a like nature when and as often as they or he shall think fit, the legacy or legacies, part or share of such issue or any of them, and to pay or apply the interest, dividends, stocks, funds, and annual produce thereof, or a competent part thereof, according to the discretion of the trustees or trustee, in the maintenance, education, and bringing up of such issue," that is to say, the issue of the five daughters. I think that upon a reasonable construction of the words which the testator has used, the words which are suggested by the statement of claim ought to be read as if they were inserted in the will. If I were to do otherwise I should be going against the canon of construction, that I am to gather the meaning of the testator from the words in which he has expressed his meaning.

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V.-C. B. 1877 *In re* REDFERN. REDFERN *v.* BEYNING. Judgment.

I am not to be deterred by any accidental omission from putting the true signification on the will, and I am not to substitute what some blundering attorney's clerk or law stationer has written in this will, and treat that blunder as if it was the intention of the testator. I do not hesitate in the slightest degree, therefore, to adopt the rule which Vice-Chancellor *Hall* expressed in *Sweeting* v. *Prideaux* (1), that the testator must necessarily have meant what the mere letter of the will does not express. I think, therefore, that the will ought to be read as if it was expressed in the terms suggested in the statement of claim.

There will be a declaration accordingly; and the costs of all parties as between solicitor and client will come out of the general estate, so far as it is undistributed.

Solicitors: *Gregory, Rowcliffes, & Rawle*, agents for *Charnley & Finch, Preston*, and for *Welsby, Hill, & Co., Southport; Dangerfield & Blythe*, agents for *William Smith, Stockport.*

(1) 2 Ch. D. 413.

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LOWNDES *v.* NORTON.

V.-C. H.

1877

June 8.

[1862 L. 41.]

Tenants for Life in Succession and Tenant in Tail—Cutting down Trees—Improvement of Estate—Waste, Impeachment of—Funds in Court.

An equitable tenant for life impeachable for waste cut timber not otherwise than in due course of management. The proceeds had been brought into Court and the income ordered to be paid to her. On her death her son, being the next tenant for life dispunishable for waste, petitioned for payment to him of the timber money in Court:—

Held, that he was entitled to the money, as he would have been entitled to the trees which produced it.

PETITION.

Statement.

Thomas Lowndes, who died in November, 1840, by his will, dated the 19th of June, 1840, after appointing two executors, named, and making certain dispositions of parts of his estate, devised all his other hereditaments to Sir *R. P. Jodrell* and *Thomas M. Wilson* (the executors) and their heirs, to the use of *G. A. Clayton*, the Plaintiff, who had assumed the name of *Lowndes*, for life without impeachment of waste, with remainder to his first and other sons in tail, with remainders over.

By a codicil dated in September, 1840, the testator revoked the devise as to parts of the same hereditaments, and devised them to the same trustees, during the life of his daughter *Isabella*, the wife of *James Norton*, without impeachment of or for any manner of waste other than voluntary waste, upon trust to pay to or permit her to receive the rents and profits during her life for her separate use, and after her decease he devised the same hereditaments to the use of *R. T. L. Norton*, the son of his daughter, for life without impeachment of or for any manner of waste other than voluntary waste, with remainders over.

By a deed dated the 5th of November, 1840, the testator, being desirous of making further provision for his daughter and her son, conveyed certain freehold and copyhold hereditaments to *E. Gatty*, to the use of *Gatty* during the life of *Isabella Norton*, upon trust to pay to or permit her to receive the rents and profits during her life for her separate use, without power of anticipation, and after her decease to the use of *James Norton* for life without impeach-

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V.-C. H. 1877 LOWNDES v. NORTON

Statement.

ment of waste, with remainder to the use of the daughter's son (*R. T. L. Norton*) for life without impeachment of waste, with remainder to the Plaintiff for life, and to his first and other sons in tail, and an ultimate remainder to the grantor in fee.

Isabella Norton, after the death of the testator, was permitted by *Gatty* to receive the rents and profits of the hereditaments comprised in the indenture of November, 1840. Upon the lands comprised in the indenture of November, 1840, were standing and growing a large quantity of trees. Mrs. *Norton* directed that a great number should be cut down and sold, and she advertised many more for sale by auction. The bill in this cause was filed to restrain that sale, and for an account of the trees which had been cut down and sold, and for costs of the suit against Mrs. *Norton*.

Mrs. *Norton* by her answer submitted that she had been made by the deed dispunishable for waste; and further, that the cuttings of the trees had been for the advantage of the trees left standing, and of the estates. The decree made in April, 1864, by Vice-Chancellor *Stuart* dismissing the bill was appealed against, and the Lords Justices, on the 8th of July, 1864, declared that Mrs. *Norton*, as tenant for life, was not dispunishable for waste. The injunction which had been granted was continued, and a sum of money, £2865 11*s.* 6*d.*, which had been received for the timber cut and sold was ordered to be and was paid into Court to the credit of the cause, "The timber account," and the trees so cut by Mrs. *Norton* "not appearing to the Court to have been cut by her otherwise than in a due course of management" of the hereditaments comprised in the deed of November, 1840, it was ordered that the interest accruing on the fund (out of which the costs had been paid) should be paid to Mrs. *Norton* during her life.

Mrs. *Norton* died in April, 1877. Her husband, *James Norton*, died in October, 1853. This was a petition presented by *R. T. Lowndes Norton*, their son, praying that, after payment thereout of the costs and succession duty, the residue of the fund standing to the above account, in Court, might be transferred to him.

Argument.

Hastings, Q.C., and *Ingle Joyce*, for the Petitioner, after referring to *Lowndes* v. *Norton* (1), submitted that the law upon this subject had been settled by the decisions in *Gent* v. *Harrison* (2), *Phillips*

(1) 33 L. J. (Ch.) 583. (2) Joh. 517.

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v. *Barlow* (1), *Waldo* v. *Waldo* (2), and *Jodrell* v. *Jodrell* (3), and that those decisions were, in effect, that where timber was properly cut by the first tenant for life without impeachment of waste, he was entitled to the profits arising from the sale, but as this was a fund arising from the sale of timber which was cut before the first tenant for life without impeachment of waste came into possession of the hereditaments, he was entitled to it. The only question that could arise for consideration was whether the timber was properly cut, but the answer to that would be that it was impossible to read the order of the Lords Justices without coming to the conclusion that it was. Where trees were improperly cut the tenant for life was not allowed to have the benefit of his or her improper act, but in this case the tenant for life was, on the ground that it did not appear to the Court that the trees had been cut by her otherwise than in a due course of management of the estate, allowed to have the income, and the inference therefore was that the trees were properly cut. They also referred to *Honywood* v. *Honywood* (4), and distinguished it.

Dickinson, Q.C., and *Renshaw*, for the Respondents:—

The question in this case is not governed by *Gent* v. *Harrison*, as the judgment (5) shews. The trees were cut by a tenant for life who was impeachable for waste. She having no right to cut and sell them, unless there be something in the case to take it out of the general law, the proceeds of sale belong to the first owner of the inheritance, and not to the next tenant for life, though unimpeachable for waste: *Pigot* v. *Bullock* (6). But has this case been taken out of the general rule, the mere fact of the Court saying that it "not appearing" that the trees had been cut otherwise than in a due course of management (but not saying that there was a rightful cutting of the trees), and therefore allowing Mrs. *Norton* to have the income during her life, did not affect the right of the tenant in tail to the corpus. The proceedings shew that all that the Court did was not to punish her for cutting the trees. The next tenant for life could not have maintained an action of trover for the trees, though the tenant in tail could have

(1) 14 Sim. 263.
(2) 12 Sim. 107.
(3) Law Rep. 7 Eq. 461.
(4) Law Rep. 18 Eq. 306.
(5) Joh. 524.
(6) 1 Ves. 479.

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V.-C. H. 1877 LOWNDES v. NORTON. Argument.

brought such an action, and by analogy he cannot come here and ask to be paid their value. Because the Lords Justices said they would not punish Mrs. *Norton*, they did not interfere with the rights of those in remainder or alter the law of the Court, which is that the trees belong to the owner of the inheritance, and therefore he is entitled to this fund.

[They referred to *Lewis Bowle's Case* (1), *Bagot* v. *Bagot* (2), *Honywood* v. *Honywood* (3), *Coke* upon *Littleton* (4), *Udal* v. *Udal* (5), and *Robinson* v. *Litton* (6).]

Judgment.

HALL, V.C.:—

I am of opinion that the Petitioner, a tenant for life without impeachment for waste, is entitled to this fund, which represents the proceeds of the trees cut and sold by Mrs. *Norton*, who was a tenant for life not without impeachment for waste. The case is in effect like that of *Pigot* v. *Bullock* (7), though in one respect distinguishable, as there the tenant for life sought to recover money from the estate of a prior tenant for life, but here, through the action of a legal tenant for life in remainder, who by his application to this Court for an injunction to restrain the cutting of other trees, the fund now in Court was secured and preserved for those who might become entitled to it. The estate was vested in a trustee, and the trees were cut and sold by the equitable tenant for life—a lady, who was the actual wrong-doer. The trustee's duty was to preserve the estate against any wrongful cutting of timber, as well for her as for those in remainder. The question was brought before the Court by a tenant for life in remainder, and the Court, after due investigation, ordered that the fund should be invested, and the income only—according to equitable principles—be paid to the tenant for life. In so ordering the Court did not adopt the principle that the property in the timber belonged to the person who had the first estate in the inheritance. It seems to me that the view of the Court was that under the circumstances there was a remedy by injunction as to future cuttings; and that

(1) 11 Rep. 79 b.
(2) 32 Beav. 509, 517.
(3) Law Rep. 18 Eq. 306.
(4) Butler's Ed. 218 B, note 2.
(5) Aleyn, 81.
(6) 3 Atk. 209.
(7) 1 Ves. 479.

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the money representing the former cutting of trees should be preserved, so that the rights of all parties in respect of the trees might be treated and dealt with as if they had remained trees. The consequence of that is this—it is clear that when there comes a tenant for life without impeachment for waste, and claims the timber money on the ground that the trees would have come to him, and he could have done with them what he liked, he must be held entitled to it. This conclusion accords with equity and good sense. As to the owner of the inheritance, it is clear that he can only claim the fund by adopting the wrongful act and the consequences which flow from it. Then as to the authorities, I think that *Waldo* v. *Waldo* (1) and *Phillips* v. *Barlow* (2) are distinguishable from this case. In *Waldo* v. *Waldo* the Court inquired, as it has constantly done, into the condition of the estate as to the timber, and then concluded that it was fit and proper to treat the proceeds as representing the timber which had been cut, but the Vice-Chancellor of *England* expressly laid down that the proceeds of the timber which had been cut would become the property of the first tenant for life in possession who would be unimpeachable for waste. The case of *Phillips* v. *Barlow* contains similar doctrine. *Gent* v. *Harrison* (3) was a case where the Vice-Chancellor, after commenting at considerable length upon the legal rights of the parties as to the timber, decided this very point. It was a suit instituted against the representatives of a tenant for life not empowered to commit waste, by a succeeding tenant for life dispunishable for waste, and the Plaintiff was allowed to recover the proceeds of sale. That case seems to me to be undistinguishable from the present; but quite independently of the authorities, the substance of what has been done is this: the Court took upon itself to preserve the fund, with the view of keeping it exactly in the same position as the timber, which it represents, would have been in, and on that ground alone I am of opinion that the Petitioner is entitled to it, and after the payment of the succession duty and the costs, the residue must be paid to him.

Solicitors: *Wing & Du Cane; Satchell & Chapple.*

(1) 12 Sim. 107. (2) 14 Sim. 263.

(3) Joh. 517.

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FRY, J.
1877
June 7.

GALE *v.* GALE.

[1876 G. 84.]

Voluntary Settlement—Covenant—Widow—Children of First Marriage.

The performance of a covenant by a widow on her second marriage to convey property for the benefit of her children by a former marriage, if made in pursuance of an agreement between her and her intended husband, will be enforced at the suit of those children, and is an exception to the general rule that the performance of a covenant cannot be enforced by volunteers.

Price v. *Jenkins* (1) considered.

Statement.

BY an indenture of settlement made between *Henry Coulter* of the first part, *Mary Ann Gale* (afterwards *Mary Ann Coulter*), widow, of the second part, and *John S. Gale* of the third part, after reciting that *Mary Ann Gale* was seised of a copyhold messuage and some cottages as tenant of the manor of *Fulham*, and that a marriage had been agreed upon, and was intended to be shortly solemnized, between *Henry Coulter* and *Mary Ann Gale*, and that upon the treaty for the marriage it was agreed that the said copyhold messuage and premises should be surrendered and assigned in the manner, upon the trusts, and for the intents and purposes thereinafter mentioned, it was witnessed that in pursuance of the said agreement and in consideration of the intended marriage, *Mary Ann Gale*, with the consent and approbation of *Henry Coulter*, covenanted with *J. S. Gale* to surrender the said messuage and premises unto *J. S. Gale*, to be held by him upon trust for *Mary Ann Gale* for her life for her own sole and separate use and benefit; and after her decease upon certain trusts for the benefit of *John S. Gale*, *Frederick Gale*, *Rosina Johnson*, and *Charles Gale*, and their children, as therein mentioned.

The marriage was solemnized in 1861, but the copyholds were never surrendered.

John S. Gale, *Frederick Gale*, *Rosina Johnson*, and *Charles Gale* were the children of *Mary Ann Coulter* by her first husband. *Henry Coulter* died in 1867, and *Mary Ann Coulter* died in April, 1875, having by her will devised the copyhold messuage and pre-

(1) 4 Ch. D. 483.

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mises in different portions to her children absolutely, except as to one cottage, which was devised to her sister for life.

John S. Gale and his children brought this action against the other children of *Mary Ann Coulter*, stating as above stated, and claiming a declaration that the limitations in the settlement were valid and binding, and that the devisees under the will of *Mary Ann Coulter* might be directed to surrender the copyhold messuage and premises to *John S. Gale* as trustee of the settlement.

Statement.

The action now came on for trial.

Everitt, for the Plaintiffs:—

Argument.

The Plaintiffs no doubt are volunteers coming to enforce a covenant, but they are children of a former marriage of the settlor, and so form an exception to the rule that volunteers cannot enforce a covenant: *Newstead* v. *Searles* (1); *Jthell* v. *Beane* (2); *Clarke* v. *Wright* (3); *Johnson* v. *Legard* (4); *May's* Fraudulent Conveyances (5). This is a peculiarly strong case, as the husband gives up all his interest, and that gives a clear consideration. Some of the observations of Vice-Chancellor *Hall* in *Price* v. *Jenkins* (6) have been considered to be on the other side, but they are not, and that case has been reversed on appeal, though on another point, the Court refraining from giving any opinion on the question (7). Moreover, this is in fact a trust: *Ex parte Cuming* (8).

Grosvenor Woods, for one of the Defendants:—

The only real exception from the rule as to enforcing voluntary settlements is in the case of the children of the marriage, and that is rendered necessary by the exigencies of society. *Newstead* v. *Searles* was a case under the statute of *Elizabeth*, and comes under a different principle; moreover, in that case there was provision for the children of the second marriage, and it would be difficult to say that that could be enforced and not the provision for the children of the first marriage, but why should the fact of

(1) 1 Atk. 265; West, Ch. 287.
(2) 1 Ves. Sen. 215.
(3) 6 H. & N. 849.
(4) 3 Madd. 283.
(5) Page 338.
(6) 4 Ch. D. 483.
(7) 5 Ch. D. 619.
(8) Law Rep. 5 Ch. 72.

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FRY, J. 1877 GALE v. GALE. Argument.

a second marriage give to the children of a first marriage, with which they have nothing to do, any rights which any other relations would not have had? In the time of Lord *Hardwicke* the rules of equity were not fixed, and moral considerations were more regarded than they are now. Lord *St. Leonards* disapproves of extending the doctrine to volunteers: *Sugden's* Vendors and Purchasers (1). In *Story's* Equity Jurisprudence (2) the proposition is treated as clear. *Dart's* Vendors and Purchasers (3) shews what doubts are entertained.

G. C. Price, for the other Defendants:—

The only real object of this settlement was to protect the life interest of the wife, and the Court will not interfere as to the rest. There was no provision for any children of the marriage, and therefore the reasoning that all the children must be included does not apply: *Chapman* v. *Emery* (4), but it must be admitted that the case is incorrectly cited in *Sugden's* Vendors and Purchasers (5). In the folio edition of *Cowper* there is a full stop instead of a comma after the words "I rather doubt Lord *Hardwicke* saying that." An agreement between *A.* and *B.* for the benefit of *C.* gives *C.* no right to enforce it; and in *Jefferys* v. *Jefferys* (6) it was held that such a covenant would not be enforced. *Sutton* v. *Chetwynd* (7), referred to by Lord *St. Leonards* (8), is much in point.

Judgment.

FRY, J.:—

This question has been fully argued, and I have formed upon it a conclusion which, if it is bad law, must be reversed by a higher authority.

The question arises in this way: In the year 1861 a lady somewhat advanced in years contracted a marriage with a second husband, previously to which she executed a settlement, the parties to which were the husband, the wife, and the trustee, the

(1) 14th Ed. p. 717.
(2) Sect. 433.
(3) 4th Ed. p. 816.
(4) Cowp. 278, octavo edition.
(5) 14th Ed. p. 717, following the octavo edition of *Cowper*.
(6) Cr. & P. 138.
(7) 3 Mer. 249.
(8) Law of Property, 153.

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subject of which was certain copyhold property belonging to the lady. The object was to reserve to herself a life interest to her separate use, and subject thereto to settle the property on her children by a former marriage and their children. The settlement contains a recital that "upon the treaty for such marriage it was agreed that the said copyhold, messuage, and premises should be surrendered and assigned in the manner, upon the trusts, and for the purposes hereinafter mentioned."

Now, for this settlement there appear to have been reciprocal considerations, that is to say, the husband was to obtain the marriage, and on the other hand, he was willing to give up something which, but for the settlement, he would have acquired, the right to the rents and profits during the life of his wife, and probably, according to custom, during his own life if he survived her. If, however, anything turned upon that, I should require evidence as to the custom in that particular manor. The husband died in 1867, and the wife died in 1875, having by her will devised this property in a manner inconsistent with the limitations of the settlement. The Plaintiffs claim under the settlement, and the Defendants claim under the will, though they would also take interests under the settlement, but I will consider the case as if the settlement gave the property to *A.* and the will gave it to *B.*

The only observation which arises on the will is, that the Defendants are, of course, volunteers, and cannot claim under the statute of *Elizabeth.*

I called attention to the fact of there having been consideration for the settlement, though there had been no consideration from the persons who seek to enforce the settlement. If *A.* makes a gift to *C.*, or *A.* buys from *B.* and gives to *C.*, or *A.* and *B.* agree to give to *C.*, in all these cases the gift is voluntary. In the first case there is no consideration at all, in the second case there is consideration between *A.* and *B.*, and in the third case there is or may be consideration between *A.* and *B.*; and these three seem to illustrate all the cases of similar agreements which can arise. There may be either a gift by the husband to his wife for her life and after her death to her children, or there may be a purchase, as it were, by the wife from the husband for the benefit of her children, or there may be an agreement between the husband and

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wife that property shall be given to her children by a former marriage. This case seems to belong to the third class, because there is an agreement that this property shall be given to the children of the former marriage, the agreement being not without consideration as far as the husband is concerned; but it is not so clear that there was any consideration moving from the wife unless it be the benefit of the marriage, and as to the children of the former marriage, they are volunteers beyond a doubt.

The general rule is, that in favour of stranger volunteers, that is, volunteers who are not parties, the Court will not enforce a settlement or contract or covenant not perfected, and will not interfere for the purpose of giving further performance of a contract or covenant. Now, is that a principle of universal application, or are there exceptions? It is not universal, because there is nothing better established than that the children of a marriage can enforce the marriage settlement. They are said to be within the marriage consideration, that is to say, are so clearly within the objects of the settlement that it would be wrong and injurious to the interest of society not to allow them to enforce it. That, therefore, is an exception to the general rule. Is there another exception? I think there is another exception, established by the case of *Newstead* v. *Searles* (1), extending to the case of a widow who having children by a former marriage is about to marry, and who contracts with her intended husband that a benefit shall be conferred on those children. [His Lordship then stated the facts in *Newstead* v. *Searles*.] Upon these facts two questions arose: first, whether the grandchildren of the first marriage could maintain a bill for the performance of the articles of settlement, no consideration moving from them, and they not being parties. Lord *Hardwicke* held that they could. The second question was, whether they were purchasers or persons claiming for valuable consideration so as to prevent the statute of *Elizabeth* from applying. That question Lord *Hardwicke* also determined by holding that the statute did not apply to such a case, and therefore that, so far as relates to consideration, the grandchildren were not volunteers. That he did determine these two points cannot be doubted. I read this passage, "I am of opinion these articles ought not to be considered as a

(1) 1 Atk. 265; West, Ch. 287.

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voluntary agreement, and that the Plaintiffs are entitled to relief in this Court." It is true that he added other considerations: he pointed out how the limitations to the children of the first and second marriages were commingled, and this, it was argued, made an essential difference between *Newstead* v. *Searles* (1) and this case. Mr. *Grosvenor Woods* argued, first, that *Newstead* v. *Searles* was decided only on the statute of *Elizabeth*, but, as I have shewn, it was not so. He argued, secondly, that there was this distinction between the cases, that in *Newstead* v. *Searles* the children of the two marriages were commingled, and that Lord *Hardwicke* said if the children of the second marriage had instituted proceedings, the children of the first marriage might have taken the benefit; but that was not the case before him, and if that had been the ground he would not have allowed the children of the first marriage to institute proceedings. That principle, therefore, could not have justified Lord *Hardwicke* in his decision. It seems to me that *Newstead* v. *Searles* is all that is necessary for determining this case. I find here a widow with children by a former marriage, an agreement for a settlement upon these children, a husband giving up a benefit, a wife dealing with her property, and a marriage upon this agreement, and the issue of the first marriage instituting proceedings. And I find in that case the same circumstances, and the Court enforcing the articles of settlement.

It has then been argued that that case is opposed to the current of decisions which have since been given, that the principles which guided Lord *Hardwicke* have been modified or abandoned, and that the principles now established are inconsistent with those which prevailed in his time. I am not prepared to say that it is not so to some extent, if they were followed out to their logical conclusion; but it appears to me that *Newstead* v. *Searles* has been repeatedly recognised by authority which is binding on me.

The next case is *Jthell* v. *Beane* (2), where the same Judge made this observation: "This is different from the case of a bond by a father; for it is a contract between the husband and the second wife and her friends . . . . it being provided in the agreement that the son by the former wife should come in for a share:

(1) 1 Atk. 265; West, Ch. 287. (2) 1 Ves. Sen. 215.

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which is a bargain and for valuable consideration: for had it not been for this provision the husband would not agree to let it go so far as £400. This often happens on the marriage of a widow; who contracts on a second marriage to make a provision out of her own estate after her death and the death of her second husband for her children by a former: which may be said to be voluntary; yet is reasonable, prudent, and natural; several of which have been supported in this Court as provisions for the children by the first marriage for valuable consideration." It is quite evident that Lord *Hardwicke* treats a case of this class as having been upheld as reasonable, prudent, and natural, and an exception from the general rule. Then, in *Chapman* v. *Emery* (1), Lord *Mansfield* seems to have taken the same view, for in answer to an observation quoted as from Lord *Hardwicke*, after expressing a doubt whether Lord *Hardwicke* had said so, he himself says, "Where a woman about to marry a second husband makes a settlement upon her children by her first husband, such settlement has been held good." In *Cruise's* Digest (2) this is treated as an exception from the general rule. In *Clarke* v. *Wright* (3) the question was whether a settlement of real estate made by a widow on her illegitimate son in contemplation of her second marriage was valid, as against a purchaser for valuable consideration. No doubt there was in that case no question as to enforcing a covenant, and the only question was as to the statute of *Elizabeth*; but *Newstead* v. *Searles* (4) was brought under consideration, and Chief Justice *Cockburn* used this language, which seems to me of great importance in relation to the present case (5): "Upon the rule that in a marriage settlement a limitation in favour of the relatives of the settlor other than the issue of the marriage will be invalid, two exceptions have, it seems to me, been engrafted by very high authority. In *Newstead* v. *Searles*, Lord *Hardwicke* held that in a marriage settlement the settlor might introduce a limitation in favour of the children of the former marriage; while in *Clayton* v. *Earl of Wilton* (6), Lord *Ellenborough* and the Court of King's Bench upheld against a purchaser for

(1) Cowp. 278, 280.
(2) 4th Ed. vol. iv. p. 443.
(3) 6 H. & N. 849.
(4) 1 Atk. 265; West, Ch. 287.
(5) 6 H. & N. 873.
(6) 6 M. & S. 67, n.

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value a similar limitation in a marriage settlement in favour of the issue of the settlor by a future wife in default of issue of the intended marriage. These decisions have never, so far as I am aware, been impugned. The decision of Lord *Hardwicke* in *Newstead* v. *Searles* (1), which has now stood for upwards of a century, is cited by Lord *St. Leonards* in a recent work as an existing authority. It is evident that Lord *Hardwicke* considered that a provision in a marriage settlement in favour of existing children could not be deemed fraudulent within the statute. It may be that these decisions would not stand the test of a very strict analysis or rigorous logic, but it must be borne in mind that the rule on which this exception was engrafted was itself the result of a forced and arbitrary construction of the statute. It is not to be wondered at, that judicial exposition stopped short of applying it when the consequence was to prevent the owner of property, on making a settlement on marriage, from making any binding provision for his existing children. We ought not, in my judgment, to overrule the cases to which I have referred. Having stood thus long unimpeached, they may have led to the introduction of similar provisions into many settlements, and we cannot tell what mischief we may occasion by overturning them, while no mischief can arise from sanctioning such limitations beyond what arises from their introduction in favour of the issue of an intended marriage." Now, that is a most emphatic approbation and adoption by the Lord Chief Justice of *Newstead* v. *Searles* in its integrity. It has stood for a century, and is consistent with the habits and interests of society, and is an authority which the Court of Exchequer Chamber thought ought to be upheld notwithstanding its difficulties. It is evident that the same line of argument which was addressed to me to-day as to the more recent decisions was addressed to the Court of Exchequer Chamber, and induced Mr. Justice *Williams* to say that *Newstead* v. *Searles* was not binding. That, however, was not the decision of the Exchequer Chamber, and I feel myself bound by *Newstead* v. *Searles*, the only question being whether it governs this case, and, as I have already said, it is nearly the same as this.

My attention has been called to the case of *Price* v. *Jenkins* (2),

(1) 1 Atk. 265; West Ch. 287. (2) 4 Ch. D. 483.

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before Vice-Chancellor *Hall*, which was overruled in the Court of Appeal (1) upon a different ground, some of the Judges in that Court expressing their wish not to be considered as giving any opinion on the judgment of the Vice-Chancellor. A decision of the Vice-Chancellor is, however, entitled to great attention, and it does not appear to me that he intended to throw any doubt upon *Newstead* v. *Searles* (2) as an authority. He says (3), with respect to *Ithell* v. *Beane* (4), "There the case supposed is that of a widow about to marry stipulating with her intended husband that, in favour of the children of her former marriage, some portion of her property shall be settled in a particular way. If there were such a bargain, I can understand, and do not dispute that it must have effect given to it, the question in these cases being, was there a bargain, according to the true construction of the particular instrument, that the property should be settled?" Now, here is the case of a widow with children, who enters into a bargain that property should be settled; which is the very case excepted by the Vice-Chancellor.

My attention was also called to the observations of Lord *St. Leonards* (5), as shewing that he did not consider *Newstead* v. *Searles* an authority. But even if he had more pointedly disapproved of that case, I could not be bound by those observations after the sanction which has been given to that case by the decision in *Clarke* v. *Wright* (6).

No doubt the result is singular, because as *Jefferys* v. *Jefferys* (7) shews, if a similar settlement is executed, but not upon a marriage, the Court will not enforce it in favour of the children as volunteers. I accept that conclusion, for, as the Lord Chief Justice has stated, this rule as to a settlement on a second marriage has been engrafted as an exception on the general rule of law as to the rights of volunteers, as these children are not in the position of ordinary volunteers.

I come to the conclusion that the Plaintiffs are entitled to the relief which they ask for. My decision has nothing to do with the

(1) 5 Ch. D. 619.
(2) 1 Atk. 265; West, Ch. 287.
(3) 4 Ch. D. 489.
(4) 1 Ves. Sen. 215.
(5) V. & P. 14th Ed. p. 717.
(6) 6 H. & N. 849.
(7) Cr. & P. 138.

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case of the husband making a provision for his children by a former wife, as to whom Mr. *Dart* (1) suggests that the same considerations do not apply.

Solicitor for Plaintiffs: *T. L. Galmoye.*
Solicitors for Defendants: *G. R. Pilgrim; S. C. H. Sadler.*

JAQUES *v.* MILLAR.

[1876 J. 127.]

Specific Performance—Agreement for a Lease—Date—Commencement—Statute of Frauds—Damages—Remoteness—Loss of expected Profits.

A memorandum of agreement to grant a lease, not stating any time for the commencement of the lease, construed as an agreement for a lease to commence immediately from the date of the agreement, and held sufficient under the *Statute of Frauds.*

The Plaintiff agreed with the Defendant to take a lease of premises belonging to the Defendant for the purpose, as the Defendant knew, of carrying on a trade which the Plaintiff was about to commence. In consequence of the Defendant's wilful refusal to fulfil his agreement, the Plaintiff was unable for fifteen weeks to commence his trade:—

Held, that, in addition to judgment for specific performance of the agreement, damages must be awarded in respect of the Plaintiff's loss of profits from his trade during the fifteen weeks; and £250 damages were awarded.

Statement.

ON the 5th of September, 1876, the following agreement in writing was entered into between the Plaintiff, *F. Jaques*, and the Defendant, *D. C. Millar*, and was duly signed by them respectively on the day of the date thereof:—

"*London*, 5 September, 1876.

"Memorandum of agreement between *Daniel Cargill Millar*, of 200, *Lambeth Road*, S.E., and *Frank Jaques*, of 13, *Brixton Road*, S. By this *D. C. Millar* agrees to let, and *F. Jaques* agrees to take, the premises known as *Milrevan Works*, situate in the rear of *Doughty Street, Lambeth Walk*, for the term of thirty years, at a yearly rental of one hundred and twenty pounds per annum."

Jaques, in October, 1876, commenced an action for specific

(1) Dart, V. & P. 5th Ed. p. 894.

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performance of this agreement, and for damages for non-performance.

By the statement of defence the Defendant *Millar* stated that the agreement for the lease was conditional on the Plaintiff furnishing satisfactory references, which he had not done; and stated that "The time for the commencement of the said term, the payment of the said rent, and the terms of the several other conditions for the proposed letting, and the character of the business to be carried on by the Plaintiff upon the said premises, have never been agreed upon between the Plaintiff and Defendant. It was on the said 5th of September, 1876, expressly arranged and understood between the Plaintiff and the Defendant that the agreement so entered into between them was not to constitute an immediate letting, but was binding only to the extent of the terms at that time settled."

The action now came on for trial.

Argument.

Kekewich, Q.C., and *Northmore Lawrence*, for the Plaintiff:—

The first objection taken by the Defendant is that there is no sufficient agreement under the *Statute of Frauds*, because the commencement of the term is not specified in the agreement, but when that is the case the demise is held to be immediate: *Co. Litt.* (1); *Doe* v. *Benjamin* (2); *Staniforth* v. *Fox* (3). In *Blore* v. *Sutton* (4) the question was merely whether such a lease could be granted by trustees, and there was no date to the memorandum. In *Cox* v. *Middleton* (5) the terms were clearly uncertain.

Cookson, Q.C., and *M. R. Phillips*, for the Defendant:—

The cases cited in favour of the Plaintiff were before 8 & 9 Vict. c. 106, when an agreement could operate as a demise, now it cannot, and the commencement of the demise remains indefinite. Such an agreement was held insufficient in *Nesham* v. *Selby* (6) and in *Cartwright* v. *Miller* (before Vice-Chancellor *Malins*, 21st March, 1877). Here the intended lessor was an engineer in the

(1) 46 b.
(2) 9 A. & E. 644.
(3) 7 Bing. 590.
(4) 3 Mer. 237.
(5) 2 Drew. 209.
(6) Law Rep. 13 Eq. 191; Ibid. 7 Ch. 406.

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occupation of the premises, and it cannot be supposed that he intended to give it all up on the 5th of September. The date is merely to shew when the agreement is made, not when the lease is to begin. The parties must state the terms of their agreement, and if they choose to leave them indefinite, neither can complain if the agreement cannot be enforced.

Judgment.

FRY, J.:—

The question I have to decide is upon an agreement which is in these terms:—[His Lordship read the agreement.] The point to be considered is whether or not this is a sufficient memorandum within the *Statute of Frauds* to enable the Plaintiff to maintain an action upon it, the suggestion being that the agreement gives no date from which the thirty years will run, and consequently that the memorandum does not contain all the essential terms of the agreement. Now, in the first place, this is called "a memorandum of agreement," and I am therefore not called upon to consider the question whether the intention of the parties was to express some only of the terms, or to enter into a concluded agreement. They have described the instrument as a memorandum of agreement, and I must therefore construe it as an agreement if I can. There is clearly no indication of the commencement of the term, except the date of the document; but it is equally clear that the agreement is couched in the present tense. There is no express postponement of the time at which the agreement is to come into operation: there is nothing to be done beforehand, no repairs and no stipulation as to the preparation of the lease by the lessor's solicitor, no condition precedent to the operation of the agreement.

That being the nature of the agreement, I should, independently of authority, be very much inclined to hold that it operates *in præsenti*. But it seems to me that the point is covered by the authority of *Doe* v. *Benjamin* (1), which Mr. *Cookson* endeavoured to explain away. There was in that case no more indication of the time when the seven years was to commence than in this case, and there was in that case a reason against allowing the seven years to run from the date, because the lessor was thereby deprived of a portion of his rent; but the Court considered the

(1) 9 A. & E. 644, 651.

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construction so clear that that circumstance did not enable them to reject it. Lord *Denman* said: "It is also observed that no time is specified at which the lease shall commence, and that if it is supposed in consequence to begin immediately, the existing term is surrendered, and a part of the current rent dropped. That may be so, but if such is the case, it is probable that the parties did not contemplate all the consequences of their agreement." And he says, "that consequence cannot prevail against the words of the instrument which import a present lease." Mr. Justice *Littledale* was of the same opinion, and cited the passage in *Coke* (1). The Court had two points to consider: first, the construction of the agreement, and if it was a concluded agreement for a present demise, then whether it operated as a lease or not, and they determined both points in favour of the lessee.

It was suggested that the case of *Blore* v. *Sutton* (2) is inconsistent with this. In that case the Master of the Rolls undoubtedly said that the memorandum did not specify the time of the commencement of the lease, but that was a peculiar case, and I cannot discover from the report whether the memorandum bore the date of the day upon which it was actually signed. The next case is *Nesham* v. *Selby* (3), but there the agreement was to take a particular house for seven years on its being put into tenantable repair. It might well be contended that the letter containing the agreement did not necessarily imply that the lease was to take effect from that day, inasmuch as doing such things must take time, and therefore the letter did not contain all the terms. It does not follow that the same principle applies when nothing is to be done. The case as it came before the Court of Appeal (4) does not throw any light upon this particular point. The other case is *Cartwright* v. *Miller*, where the agreement was contained in a letter signed by the lessee, in which he defined the terms but went on to speak of certain repairs to be done, which the Vice-Chancellor seems to have thought a condition precedent before the term could commence, and he decided that case according to the principle of *Nesham* v. *Selby*.

I do not think that either of these cases is inconsistent with *Doe*

(1) Co. Litt. 46 b.
(2) 3 Mer. 237.
(3) Law Rep. 13 Eq. 191.
(4) Ibid. 7 Ch. 406.

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v. *Benjamin* (1), which is a decision that an agreement in these terms does operate *in præsenti* from the date of the memorandum. I hold that the Plaintiff is entitled to say that this is an agreement for a lease to commence at the date of the agreement.

The trial then proceeded.

Statement.

The Plaintiff deposed that he agreed to take the premises for the purpose of carrying on there the business of an oil refiner, and that this intention was known to the Defendant. The Plaintiff said that he could have turned out fifty tons of oil per week; that there was an ample market for the sale of the oil, and that he should have made a profit of £1 per ton, or £50 per week; that in consequence of the Defendant's refusal to carry out the agreement, the Plaintiff was unable to commence his business until he could procure other premises, which he was not able to do for fifteen weeks after the date of the agreement, and he therefore claimed damages for the loss of a profit of £50 per week for fifteen weeks, *i.e.*, £750. He admitted, in cross-examination, that he had carried on an oil-refining business in the year 1862, and had discontinued it because it did not pay. His evidence was not contradicted.

Argument.

Kekewich, Q.C., and *Northmore Lawrence*, for the Plaintiff:—

There was no condition that the vendor was to be satisfied with the reference, and the Defendant has broken his contract; the Plaintiff must therefore have damages for the breach: *Ward* v. *Smith* (2); *Engell* v. *Fitch* (3). The Defendant knew that the Plaintiff wanted the place for the purpose of oil-refining, and must pay him for his loss of profits: *Godwin* v. *Francis* (4). In *Bain* v. *Fothergill* (5) no actual loss was proved.

Cookson, Q.C., and *M. R. Phillips*, for the Defendant:—

The contract is not complete, and as it does not *ex facie* point to any other document to be executed by the parties, the Court cannot imply any stipulations, even of an ordinary character: *Ricketts* v. *Bell* (6).

(1) 9 A. & E. 644, 651.
(2) 11 Price, 19.
(3) Law Rep. 3 Q. B. 314; Ibid. 4 Q. B. 659.
(4) Law Rep. 5 C. P. 295.
(5) Ibid. 7 H. L. 158.
(6) 1 De G. & Sm. 335.

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Argument.

[FRY, J., referred to *Blakesley* v. *Whieldon* (1).]

As the agreement stands it is too absurd for the Court to enforce. It is either incomplete or absurd. With regard to the measure of damages, it was laid down in *Hadley* v. *Baxendale* (2) that "where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

[FRY, J.:—That test has always appeared to me a very difficult one to apply, for parties when contracting do not contemplate a breach of their contract.]

Neither branch of the test applies to the present case. No damages can be given for the loss of prospective profit, though they might be given under the Scotch law: *Dunlop* v. *Higgins* (3); *Mayne* on Damages (4). In *Ward* v. *Smith* (5) and the other cases relied on by the Plaintiff there was an actual trade being carried on. Here it was a speculative new business which the Plaintiff was about to start. He might have made no profit, or he might even have incurred a loss. There were many contingencies. He might get no customers; his customers might fail to pay their debts; his workmen might be dishonest; his health might fail.

[FRY, J.:—The Defendant must have known that the Plaintiff's business could not be carried on without possession of the premises.]

The Plaintiff has only suffered a disappointment, and the damage is incapable of being valued. *Engell* v. *Fitch* (6) applies to damages for loss of bargain, which is a different thing. The Plaintiff ought to have shewn by independent testimony that he could have sold his oil. He has only shewn that there was an

(1) 1 Hare, 176.
(2) 9 Ex. 341, 354.
(3) 1 H. L. C. 381.
(4) 2nd Ed. pp. 9, 31.
(5) 11 Price, 19.
(6) Law Rep. 3 Q. B. 314; Ibid. 4 Q. B. 659.

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open market, not that he had any customers or any connection. No damages ought to be awarded.

Kekewich, in reply, upon the measure of damages:—

Argument.

Hadley v. *Baxendale* (1) lays down a clear principle. When the "contemplation of the parties" is spoken of it must be meant that regard is to be had to the relative position of the parties, and, in a case like the present, to their knowledge of the intended use of the premises. If it is known that premises are taken for the purpose of a particular business, it must be known that if possession is not given at the time agreed upon the business cannot be carried on, and therefore profits cannot be made. The damages resulting from this are not too remote: *Wilson* v. *Northampton and Banbury Junction Railway Company* (2).

Judgment.

FRY, J., held upon the evidence that the alleged condition that the Plaintiff should furnish satisfactory references to the Defendant had not been proved, and that it was proved that the nature of the business which the Plaintiff intended to carry on was communicated to the Defendant.

His Lordship added: Mr. *Cookson* has argued that as the agreement contains no express reference to any other instrument to be executed by the parties, it carries with it no implication of any other stipulations, and that in its existing form it is too absurd or incomplete for the Court to enforce the performance of it. It is not necessary for me now to decide whether it carries with it *in grœmio* any stipulations which are not expressed. If it does not, I think it is perfectly intelligible in its actual form, and that it ought to be specifically performed.

The question of damages is a more difficult one. Damages are claimed, in addition to the specific performance of the agreement, in respect of the delay which was caused by the Defendant's wilful refusal to perform his contract and the consequent loss of profit to the Plaintiff. I think I am at liberty to consider what would have been the value of the possession of the premises to the Plaintiff for the period between the 5th of September, 1876, and the time when he actually obtained possession of other

(1) 9 Ex. 341. (2) Law Rep. 9 Ch. 279, 286.

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premises. I shall not attempt to explain in detail the motives which operate on my mind. But I am entitled to have regard to the damages which may be reasonably said to have naturally arisen from the delay, or which may be reasonably supposed to have been in the contemplation of the parties as likely to arise from the partial breach of the contract. Applying these tests, I assess the damages at £250. I give judgment for the specific performance of the agreement, with costs, and the Defendant must pay the £250 within a month.

Solicitors for Plaintiff: *H. Kimber & Co.*
Solicitor for Defendant: *C. T. Foster.*

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KINO *v.* RUDKIN.

[1876 K. 69.]

Obstruction of Ancient Lights—Injunction—Inquiry as to Damages—Trivial Injury—Judicature Act, 1873 (36 & 37 *Vict. c.* 66)—*Lord Cairns' Act* (21 & 22 *Vict. c.* 27)—*Rules of Court*, 1875, *Order* XVI., *r.* 13—*Adding Party at Trial—Assignment pendente lite—Practice—Procedure—Trial of Action with Witnesses—Order of Speeches of Counsel.*

Since the *Judicature Act*, as before it, a Plaintiff in an action to restrain an alleged obstruction to ancient lights cannot obtain an injunction unless he proves substantial damage.

An inquiry as to damages will not be directed where the Plaintiff has opened a case of substantial damage and has failed to prove it.

Order made at the trial to add as a co-Defendant a person to whom the Defendant had assigned his interest *pendente lite*.

The order in which the speeches of counsel on the trial of an action with witnesses are to be made, prescribed.

Statement.

THIS was an action to restrain the Defendants from obstructing the access of light to a house belonging to the Plaintiff.

The Plaintiff *C. J. Kino* was the owner for an unexpired term of seventy-two years of a house, No. 4, *Sugar Loaf Court, Leadenhall Street*, in the city of *London*. The house was on the east side of the court, and it was in the occupation of *James Stewart* under a lease granted by the Plaintiff. *Sugar Loaf Court* was in the shape of an elongated parallelogram, the southern end of which

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was formed by a house and premises known as No. 6, *Fenchurch Buildings*, of which the Defendant *Robert Finnis* was the owner. This house was separated from the Plaintiff's house by No. 3, *Sugar Loaf Court*, which joined No. 6, *Fenchurch Buildings* at the south-eastern corner of the court. On the west side of the court, and immediately opposite the Plaintiff's house, was a blank wall sixty feet high, which prevented the direct access of light to the windows of the Plaintiff's house from the west. The court was only about eighteen feet wide. The Defendant *Finnis* had recently pulled down his house, and had commenced rebuilding it. The Defendant *Thomas Rudkin* was the contractor for the work. The height of the exterior wall of the old building, No. 6, *Fenchurch Buildings*, was, according to the Plaintiff's evidence, thirty-four, and, according to the Defendant's evidence, thirty-six feet above the pavement of the court. The top of the wall was surmounted by a row of wooden palings three feet high, and the roof, which was a sloping one, rose to the height of eight feet above the top of the exterior wall. The new building, which had a flat roof, was, at the time when the action was commenced, completed to the height of 42 ft. 3 in. above the pavement of the court. It was intended to add a cornice 2 ft. 9 in. in height to the top of the wall, making the total height of the new building forty-five feet above the pavement of the court.

The statement of claim contained in paragraph 10 the following allegation:—"The effect of the Defendants' operations has already been to obstruct the radiation and access of light to the windows of the Plaintiff's premises, and so seriously has the quantity of the Plaintiff's light been diminished by the said operations, that the Plaintiff's premises are rendered nearly useless to the present tenant thereof, and the value of the Plaintiff's reversion is materially lessened, and if the Defendants continue their operations the Plaintiff's premises will become wholly unfit for business purposes, and inconvenient for occupation, and the value of the Plaintiff's reversion will be still further lessened."

The Plaintiff claimed an injunction to restrain the Defendants from permitting the new building to remain at a greater height than the height of the old one, and to restrain the Defendants from erecting or continuing the erection of any buildings so as to

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obstruct the free access of light to the Plaintiff's house as it was enjoyed previously to the erection of the new building. The Plaintiff also claimed an inquiry as to the damages suffered by him by reason of the obstruction of the access of light to his premises, and an order for payment of damages by the Defendants.

By their statement of defence the Defendants denied that their operations had obstructed, or would obstruct, the Plaintiff's light.

On the 15th of December, 1876, the Master of the Rolls, upon the undertaking of the Plaintiff to abide by any order the Court might make as to damages, in case the Court should thereafter be of opinion that the Defendants should have sustained any by reason of the order which the Plaintiff ought to pay, granted an injunction restraining the Defendants, until judgment in the action or further order, from carrying the new building to any greater height than it had then been carried so as to obstruct the Plaintiff's light.

This was the trial of the action.

The Plaintiff adduced evidence to prove the height of the old house, No. 6, *Fenchurch Buildings*, and of the new building, and proved that the new building would diminish the light in the court and in the Plaintiff's house. But neither the Plaintiff's tenant nor any occupant of the court gave any evidence, nor was there any evidence of material inconvenience to the Plaintiff's tenant, or of substantial damage to the value of the reversion.

Argument.

Cookson, Q.C., and *McLaren*, for the Plaintiff.

Bevir, Q.C., and *W. A. Clark*, for the Defendants, stated that the Defendant *Finnis* had, *pendente lite*, assigned all his interest in No. 6, *Fenchurch Buildings*, to a Mr. *Worley*, and asked that *Worley* might be added, under Rules of Court, 1875, Order XVI., rule 13, as a co-Defendant to the action.

Cookson, Q.C., and *McLaren*, for the Plaintiff, did not object.

FRY, J.:—I do not think that there is any necessity for Mr. *Worley's* presence. As the assignment was made to him, *pendente lite*, I think he would be bound by the proceedings. But it is very reasonable that he should be made a party, and I will make

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an order that he be added as a Defendant, he submitting to be bound.

Cookson, Q.C., and *McLaren*, for the Plaintiff:—

The evidence shews that we are entitled to the relief which we claim: *Clarke* v. *Clark* (1); *Yates* v. *Jack* (2); *Aynsley* v. *Glover* (3); *Kelk* v. *Pearson* (4); *Theed* v. *Debenham* (5); *City of London Brewery Company* v. *Tennant* (6); *Hackett* v. *Baiss* (7); *Staight* v. *Burn* (8); *Smith* v. *Smith* (9).

[FRY, J., referred to *Back* v. *Stacey* (10).]

As the Plaintiff is the reversioner, the question to be considered is independent of the particular business for which the present tenant uses the premises. If we do not establish a case for an injunction, we are at any rate entitled to an inquiry as to damages.

The Plaintiff's case was opened by *Cookson*, Q.C., and the evidence was taken. The question then arose whether he or *McLaren* should sum up the evidence.

FRY, J.:—The trial of an action before me is not like a trial at Nisi Prius; it embodies two proceedings, the trial of the action and a motion for judgment. The course which appears to me the most convenient, and which I intend to adopt, is this: the leading counsel for the Plaintiff will open his case. The Plaintiff's evidence will then be put in, and the junior counsel will sum up. If the Plaintiff has shewn a *primâ facie* case, the Defendant's leading counsel will then open his case; the Defendant's evidence will be put in, and his junior counsel will sum up. Then, if necessary, the Plaintiff's leading counsel will reply. I am aware that some of the other Judges adopt a different procedure, but this appears to me, on the whole, the most convenient.

Cookson:—It can make no difference to the suitors which individual counsel sums up the evidence.

(1) Law Rep. 1 Ch. 16.
(2) Ibid. 295.
(3) Law Rep. 18 Eq. 544; Ibid. 10 Ch. 283.
(4) Ibid. 6 Ch. 809.
(5) 2 Ch. D. 165.
(6) Law Rep. 9 Ch. 212.
(7) Ibid. 20 Eq. 494.
(8) Ibid. 5 Ch. 163.
(9) Ibid. 20 Eq. 500.
(10) 2 Car. & P. 465.

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FRY, J.:—I cannot hear two opening speeches from one counsel. If the junior counsel was unavoidably absent I should struggle not to deprive the Plaintiff of the right to have his evidence summed up.

Bevir, Q.C., and *W. A. Clark*, for the Defendants:—

The onus is on the Plaintiff to shew a material diminution of light such as will destroy the comfort and convenience of his house as a residence, or its beneficial use as a place of business, or will seriously affect the value of the reversion. The issue between the parties is raised in paragraph 10 of the statement of claim, and it is unsupported by any evidence.

[FRY, J.:—In the *Curriers' Company* v. *Corbett* (1), an inquiry as to damages was given at the suit of a reversioner.]

The Court will not grant an injunction unless substantial damage is proved: *City of London Brewery Company* v. *Tennant* (2), is in our favour.

[FRY, J.:—If by reason of the absence of evidence I cannot grant an injunction on the ground of substantial injury either to the occupancy or to the reversioner, cannot I still direct an inquiry as to damages to the reversioner?]

The Plaintiff has adduced no evidence of substantial damage; he cannot be permitted to supplement his case now.

[FRY, J.:—I am not now exercising the jurisdiction given by *Lord Cairns' Act*. Is there not this difference since the *Judicature Act*, that I can direct an inquiry as to damages if I can see that there is damage to the extent even of 40*s*.?]

The damage must still be substantial: *Gale* on Easements (3); *Parker* v. *Smith* (4); *Kelk* v. *Pearson* (5); *City of London Brewery Company* v. *Tennant*; *Aynsley* v. *Glover* (6); *Robson* v. *Whittingham* (7).

[They were stopped by the Court.]

(1) 2 Dr. & Sm. 355.
(2) Law Rep. 9 Ch. 212.
(3) 5th Ed. 635–7.
(4) 5 Car. & P. 438.
(5) Law Rep. 6 Ch. 809.
(6) Law Rep. 18 Eq. 544; Ibid. 10 Ch. 283.
(7) Ibid. 1 Ch. 442.

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FRY, J., after stating the facts, continued:—

It is necessary, in order that an injunction should be granted, for the Plaintiff to shew that there will be a permanent obstruction to the access of light to such an extent as to render the occupation of his house less comfortable than it was before, or to prevent the present tenant from carrying on his business as beneficially as he could before, or that the Plaintiff, as the owner of the reversion, will suffer substantial or material damage by the lessening of its value. There is only one witness who says that there is a great difference in the amount of light in the Plaintiff's house, but he does not say that there will be any material inconvenience to the tenant; and as to substantial injury to the value of the reversion, I have nothing approximating to evidence. No valuer has been produced to say that the value of the reversion has been affected in any degree whatever, and I can only come to the conclusion that its value remains just as it was before. I do not forget that the Defendant intends to carry up his building to the height of forty-five feet, but there is no evidence to shew that that addition will make any difference. The only evidence upon which the Plaintiff asks me to act is the difference which is admitted to exist between the height of the Defendants' new building and that of the old one. But, although I am satisfied that the new building causes some obstruction to the access of light into the court, I am bound to bear in mind that the light which comes over it to the Plaintiff's house comes in an oblique and lateral direction; and I cannot come to the conclusion that any substantial damage has been, or will be, caused to the Plaintiff. His case therefore fails as regards the injunction. And I think it would not be right to direct an inquiry as to damages where the Plaintiff has opened a case of substantial injury entitling him to an injunction and damages, and has failed to prove any substantial damage. The action must be dismissed with costs. The Defendant is entitled, on the Plaintiff's undertaking, to an inquiry as to the damages sustained by him by reason of the interlocutory injunction.

Solicitors for Plaintiff: *Merriman, Morris, & Co.*
Solicitor for Defendants: *C. P. Pritchard.*

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FRY, J.

1877

July 2.

MORRELL *v.* COWAN.

[1876 M. 292.]

Guarantee—Construction—Consideration—Married Woman—Separate Estate—Costs.

The wife of a retail trader who was possessed of separate estate, in order to obtain credit for her husband from a wholesale merchant with whom he dealt, gave the latter a written guarantee as follows: "In consideration of you *M.* having at my request agreed to supply and furnish goods to *C.* (the husband), I do hereby guarantee to you *M.* the sum of £500. This guarantee is to continue in force for the period of six years and no longer":—

Held, that the guarantee was not limited to the price of goods supplied to the husband after it was given, but that it extended to any sums, not exceeding £500, which were due from the husband to *M.* during the six years:

Held, also, that the agreement by *M.* to supply goods did not of itself form a sufficient consideration to support the guarantee unless goods were actually supplied after it was given, but that any subsequent supply of goods not paid for in cash at once was enough to support it, even though *M.* refused to supply them until additional collateral security had been given to him by the husband, or until the husband had promised to make a payment in reduction of the balance of his account:

Held, also, that the balance due from the husband to *M.* (not exceeding £500) was a charge on the wife's separate estate, and that *M.'s* costs of an action to enforce the charge must also be charged on that estate, and, if necessary, in addition to the £500.

Statement.

THIS was an action to enforce against the separate property of the Defendant *Sarah Ann Cowan* a guarantee given by her to the Plaintiff, *George Morrell*, in order to obtain credit for her husband, the Defendant *Matthew Mitchell Cowan*.

The Plaintiff was a leather factor at *Leeds;* the Defendant *Cowan* was a boot and shoe manufacturer at *Leeds*. In May, 1875, the Defendant *Cowan* commenced trade dealings with the Plaintiff, in the course of which the Plaintiff from time to time supplied *Cowan* with goods on credit. On the 24th of December an acceptance of *Cowan* for £176 6*s.* 4*d.*, which he had given to the Plaintiff in payment for goods supplied, was dishonoured. The Plaintiff then refused to supply *Cowan* with any more goods on credit, unless he would give him security. *Cowan's* wife was entitled to considerable separate estate under the will of her former

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husband. She was not restrained from anticipation, and no settlement of the property was made upon her marriage with *Cowan*. On the 22nd of January, 1876, she gave the following guarantee to the Plaintiff:—

"To Mr. *George Morrell*.

"*Leeds*, 22nd January, 1876.

"In consideration of you the said *George Morrell* having at my request agreed to supply and furnish goods to *Matthew Mitchell Cowan*, I do hereby guarantee to you the said *George Morrell* the sum of £500. This guarantee is to continue in force for the period of six years and no longer. As witness my hand this 22nd January, 1876.

"(Signed) *Sarah Ann Cowan*."

The Plaintiff, while the negotiations for the giving of the guarantee were in progress, took up the dishonoured acceptance for £176 6*s*. 4*d*., and on the 22nd of January he advanced *Cowan* £170 to enable him to meet another acceptance for £176 which was then about to become due. After the 22nd of January the Plaintiff supplied *Cowan* with three parcels of goods. The first parcel, value £14 2*s*. 11*d*., was supplied on the 24th of February, 1876, and the Defendant paid for it by means of an acceptance of a customer of his for £14 2*s*. 6*d*., which fell due on the 15th of April and was duly paid. The second parcel, value £18 11*s*. 9*d*., was supplied on the 17th of March. The Plaintiff declined to supply these goods on credit, unless *Cowan* would promise to make him a payment to cover the price of them and to reduce the balance of his account. *Cowan* promised to pay £100, and he made the payment on the 27th of March. The third parcel of goods, value £5 16*s*., was supplied on the 23rd of March on credit. After this, other acceptances which *Cowan* had given to the Plaintiff for the price of goods previously supplied were dishonoured, and the Plaintiff supplied no more goods to *Cowan*.

On the 22nd of July, 1876, the Plaintiff signed judgment in an action against *Cowan* for £385 4*s*. 4*d*. due in respect of goods supplied, but *Cowan* failed to satisfy the judgment, and he afterwards filed a liquidation petition. On the 22nd of September, 1876, the Plaintiff commenced this action against *Cowan* and his wife to enforce the guarantee. The Plaintiff alleged that £450 was due to

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him from *Cowan*, and he claimed a declaration that the separate property of Mrs. *Cowan* was chargeable with the payment of and liable to satisfy to the Plaintiff what was due to him by virtue of the guarantee, and that the guarantee operated as a charge upon or a contract to pay out of such separate estate.

This was the trial of the action.

Argument.

Cookson, Q.C., and *John Chester*, for the Plaintiff:—

In construing the guarantee the Court must look at the surrounding circumstances: *Heffield* v. *Meadows* (1). There is nothing on the face of the instrument to shew that the £500 is limited to moneys which became due in respect of goods supplied after the 22nd of January; it applies to bills which fell due after that date, and to advances made by the Plaintiff to enable *Cowan* to take up bills which he had accepted. Though the instrument may not be a guarantee in the ordinary sense of the word, it must be construed in the same way, and it is a good charge on the wife's separate estate: *Norton* v. *Turvill* (2); *Heatley* v. *Thomas* (3); *Mayd* v. *Field* (4). The goods supplied after the guarantee was given are a sufficient consideration for it, even if the agreement to supply on the request of the wife is not of itself enough. The Plaintiff has fulfilled his agreement; he was not bound to go on for ever supplying goods when he found that *Cowan* was unable to pay. If there was consideration, the amount of it does not signify.

North, Q.C., and *Freeling*, for the Defendants:—

This is simply an action against the wife's separate estate, and it must be dealt with in the same way as if she had obtained an order to defend separately from her husband. The probable and reasonable construction of the guarantee is that it extends only to the price of goods supplied after its date, the sum of £500 being mentioned as a maximum. It could not have been intended to cover debts already incurred by the husband. It would be absurd to suppose that if goods worth only 1*s.* were supplied to the husband, the wife intended to make herself liable for £500.

(1) Law Rep. 4 C. P. 595.
(2) 2 P. Wms. 144.
(3) 15 Ves. 596.
(4) 3 Ch. D. 587, 592.

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It would have been more advantageous to pay for the goods in cash than to guarantee the existing debt. No goods were in fact supplied after the date of the guarantee simply on the faith of it, except the small parcel supplied on the 23rd of March. On the 24th of February and the 17th of March the Plaintiff refused, in fact, to supply goods on the credit of the guarantee. In the first case the customer's bill was paid as cash, and in the second case the condition was that £100 should be paid, and this condition was fulfilled. There was no sufficient consideration to support the guarantee; the mere indefinite agreement to supply goods is not enough: *Wood* v. *Priestner* (1); *Westhead* v. *Sproson* (2). There is nothing to shew that the goods supplied after the 22nd of January were supplied upon the request referred to in the guarantee. As a matter of fact the husband got no benefit.

[FRY, J.:—Probably there was forbearance on the part of the Plaintiff.]

That is not proved, nor is it pleaded.

Cookson, in reply:—

[FRY, J.:—My difficulty is this—whether there was any supply of goods upon the request mentioned in the guarantee: *Lampleigh* v. *Brathwait* (3).]

Goods were, in fact, supplied for the purpose of the husband's business, and it must be taken that this was done in pursuance of the request. The customer's bill given to the Plaintiff on the 24th of February was taken, not as cash, but as additional collateral security. Such security does not exclude the operation of the guarantee. The £100 paid on the 27th of March was paid on account. The Plaintiff was not precluded from pressing for payment of his debt.

FRY, J.:—

The main question relates to the construction of the guarantee. The surrounding circumstances which throw light upon the con-

(1) Law Rep. 2 Ex. 66, 282. (2) 6 H. & N. 728.
(3) Hob. 105.

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struction are not numerous. The Plaintiff is a wholesale leather merchant at *Leeds*, with whom the Defendant *Cowan* had dealt from May, 1875. The Defendant *Cowan* was a retail boot and shoe manufacturer in the same town. On the 24th of December, 1875, a bill of exchange for £176, which had been given by him to the Plaintiff, was dishonoured, and another bill for £170 was about to fall due in January, 1876. Mrs. *Cowan* was entitled to considerable separate property under the will of her first husband. These appear to me to be all the surrounding circumstances which it is necessary to consider. The first question which arises upon the guarantee is with regard to the £500 mentioned in it. It is said by the Plaintiff that the guarantee extends to any moneys not exceeding £500 which may be due from the husband to the Plaintiff on any account whatever during the six years. The Defendants say that the £500 is mentioned as a maximum, and that the intention was that the wife should be liable to pay only such a sum, not being more than £500, as should become due after the date of the guarantee from the husband to the Plaintiff in respect of goods supplied to the husband by the Plaintiff upon the faith of the guarantee. No such limitation as this is to be found in the words of the guarantee, and if the matter rested there, I can see no reason why the words should not mean what they say. It is aid that it is impossible that the literal meaning can be the true one, and that I ought not to impute to the parties an intention the result of which would be that a supply of goods to the husband on credit to the amount of 10*s.* after the date of the guarantee would make the wife liable for the whole £500. I am of opinion that that argument is not a sound one. Extreme cases are invaluable as tests of a rule of law and the extent to which it ought to be carried, but they are not safe guides to the construction of written instruments, because you are then endeavouring to ascertain the probable intention of the parties, and extreme cases are not within their contemplation. I do not, however, think that the literal construction of the guarantee is an unreasonable one. The object of the arrangement was to preserve the husband's credit, to tide over the difficulty which had arisen from the unpaid bill, and to provide for the payment of the other bill for £170 which was then current. I think, therefore, that the guarantee applies to any

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moneys to the extent of £500 which should during the period of six years be due from the husband to the Plaintiff.

The next question is whether any sufficient consideration was given to the wife for the guarantee. I am of opinion that the agreement by the Plaintiff to supply goods to the husband would not of itself, independently of its performance, furnish a good consideration, for it is so indefinite an agreement that it falls within the principle of the decision in *Westhead* v. *Sproson* (1), where it was held that as the guarantee which was sued upon did not contain any binding agreement by the Plaintiffs to supply goods to *P.*, and they never did supply any goods to *P.* after the date of the guarantee, the Defendants did not become liable on the guarantee. But it appears to me that the guarantee in the present case embodies a request by the wife to the Plaintiff to supply goods to her husband, and that, if that request was acceded to, a good consideration at once arose to the wife for the guarantee. My view is that the Plaintiff may say that he acted upon the wife's request in every case in which, after the guarantee was given, he supplied goods to the husband on any other terms than that of immediate cash payment, and that the Plaintiff was not precluded from refusing to supply goods unless the husband would give him additional collateral security, or would make a payment on account. It could not, I think, have been contemplated that the Plaintiff should be bound to go on for the whole six years without making any request for payment of his account, or any demand for additional collateral security. In saying this I really decide the case, because none of the three parcels of goods which were supplied after the date of the guarantee were paid for in cash at the moment. The customer's bill which was given for the goods supplied on the 24th of February was not taken by the Plaintiff as cash, but by way of additional security. When the goods were supplied on the 17th of March the husband was required to make a promise to pay £100 on account, and the payment was not made for some days afterwards. In the third case, on the 23rd of March, the goods were supplied simply on credit, without any collateral agreement at all, and I am not sure that I might not rest my decision upon that supply of goods alone. But I prefer to rest it on the other ground which I have stated.

(1) 6 H. & N. 728.

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I think, therefore, that good consideration has been shewn for the guarantee, and that the Plaintiff is entitled to a declaration that the separate property of Mrs. *Cowan* is liable to satisfy to him the amount due to him from her husband to an extent not exceeding £500. Unless the parties agree upon the sum, there must be an inquiry as to the amount due, and there must be an inquiry of what the separate property consists.

Cookson, asked that the Plaintiff's costs of the action might be charged upon the separate estate of the wife.

[FRY, J.:—Is there any authority for my doing that?]

A married woman must be liable in respect of her separate estate to the ordinary consequences of litigation. It is the separate estate which is really before the Court, not the married woman.

[FRY, J., referred to *Moore* v. *Moore* (1).]

Chester:—In *McHenry* v. *Davies* (2), which was a suit to make the separate estate of a married woman liable for a bill of exchange which she had indorsed, the costs of the suit were charged on the separate estate.

FRY, J.:—That appears to be an authority in point. The Plaintiff's costs of the action will be charged on the separate estate, and this charge will not be limited to the £500 mentioned in the guarantee.

Solicitors for Plaintiff: *Speechly, Mumford, & Co.*, agents for *Rooke & Midgley, Leeds.*

Solicitors for Defendants: *Torr & Co.*, agents for *B. C. Pullan, Leeds.*

(1) 1 Coll. C. C. 54.

(2) Law Rep. 10 Eq. 88.

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SIMMINS *v.* SHIRLEY.

FRY, J.

1877

June 5.

[1876 S. 225.]

Mortgagee in Possession—Taking Possession of Part—Wilful Default—Farm—Shooting—Woods.

The mortgagees of land, consisting of copses and of a farm which was let without the shooting or the timber, gave notice to the tenant of the farm to pay the rent to the mortgagees, and afterwards moved to restrain the mortgagors from cutting the timber:—

Held, that though the mortgagees had become mortgagees in possession of the farm, they had not become mortgagees in possession of the shooting, the copses, or the timber, so as to be liable to account for default.

Statement.

THIS was a suit for the redemption of a mortgage, the principal question in which was whether a sum of £7067, which had been paid by the mortgagors to the solicitor of the mortgagees, and had not been paid over by him, was to be taken as having been received by the mortgagees in reduction of the debt. The mortgaged estate consisted of land, part of which was let as a farm to one *Daywolf*, but the copses forming part of the land were not let to *Daywolf*, and the right of shooting over the farm was reserved to the mortgagors, who had reserved also the right to cut the timber on the farm. On the 19th of July, 1876, the mortgagees gave notice to *Daywolf* to pay his rent to them. The mortgagors in their statement of claim charged that the mortgagees were mortgagees in possession; that they had neglected to let the shooting, which had been usually let for £100 a year; and that they had not cut the underwood in the copses and had not thinned the timber; and the mortgagors claimed that the mortgagees might be charged, in addition to the ordinary accounts, with a sum of £100 for the rent of the shooting, and with the value of the season's underwood and thinning of the timber, which ought to have been cut in a due course of management. It appeared that in August, 1876, the mortgagees had moved to restrain the mortgagors from cutting the timber, and the mortgagors had given an undertaking not to cut any.

At the hearing, *Fry*, J., held that the mortgagors were entitled

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FRY, J. 1877 SIMMINS v. SHIRLEY.

to redeem on the footing of the £7067 not having been received by the mortgagees; and the question as to the liabilities of the Defendants as mortgagees in possession was then argued.

Argument.

Cookson, Q.C., and *Tremlett*, for the mortgagors:—

By giving this notice to the only tenant, the mortgagees virtually took possession of the mortgaged estate. How else can possession be taken? This renders them liable: *Fisher*, Law of Mortgage (1). The mortgagees ought to have ascertained that the shooting did not belong to the tenant, and ought to have let it. They had also power to cut the copsewood and timber, as they were in possession of the adjoining land. The mortgagees moved to restrain us from cutting, and at all events that was a constructive assertion of possession by them.

Kekewich, Q.C., and *Popham*, for the mortgagees:—

We merely moved to restrain the mortgagors from cutting, because our security was insufficient: *Fisher*, Law of Mortgage (2); *Hippesley* v. *Spencer* (3); *Humphreys* v. *Harrison* (4); *Craig* on Timber (5); *King* v. *Smith* (6). That was not taking possession. The mortgagees were not in possession of the shooting or of the copses; and giving notice to the tenant of the farm did not affect the shooting or the copses: *Soar* v. *Dalby* (7).

Judgment.

FRY, J.:—

In this case the mortgagees must be liable to account on the ordinary terms.

It is not in dispute that as to the farm demised to Mr. *Daywolf* possession was taken by the mortgagees as from the 19th of July, 1876. The question which I have to determine is as to the shooting, and the copses which were not comprised in that demise, and as to the timber.

As to the shooting, it was usually let for £100 a year, and was clearly excepted from the demise to Mr. *Daywolf*; and as to the

(1) 3rd Ed. p. 937.
(2) Ibid. 303.
(3) 5 Madd. 422.
(4) 1 Jac. & W. 581.
(5) Page 94.
(6) 2 Hare, 239.
(7) 15 Beav. 156.

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underwoods, they were in the same position, and were not demised, but remained in the possession of the lessors. As to the timber, it is not clear whether it was excepted out of the demise or whether only power to cut it was reserved. In either case, however, something was reserved. The question, then, is whether, as to these excepted parts of the property, there was an entry by the mortgagees as from the 19th of July.

It cannot be denied that a mortgagee may take possession of part of the mortgaged property. If there are two independent tenements, the mortgagor may take possession of one and not of the other, and the case seems substantially the same where the properties are physically conterminous. I think, therefore, that to take possession of the rent paid by the lessee is not to take possession of the shooting; so to take possession of a farm or of fields surrounded by copses is not to take possession of the copses; and the same principle applies to the timber, the property in which remained in the lessors.

Then it was said that in this case there was evidence of taking possession, because an application for an injunction had been made which resulted in an undertaking given by the mortgagors, and this, it was argued, shewed that the mortgagees intended to take possession; but, looking at the circumstances and at the state of the law on the subject, it seems clear that the application was not made on the ground that the mortgagees were in possession, but because the mortgagees, being out of possession, were entitled to restrain the cutting of timber when it diminished the security. There was, therefore, nothing in this to put the mortgagees in possession.

No inquiries therefore can be directed as to any default in not letting the shooting, or in not cutting the underwoods or the timber.

Solicitors for Mortgagors: *Eardley Holt & Co.*
Solicitors for Mortgagees: *Wilkinson & Sons.*

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FRY, J.
1877
June 8.

MORGAN *v.* THOMAS.

[1876 M. 325.]

Will—Construction—Specific Legacy—Ademption—Gift of "all the Real and Personal Estate which I am or shall or may be entitled to under the Will of A."—Receipt and Investment by Testator of Money derived from A.'s Estate.

A testator devised and bequeathed to the Defendants "all the real and personal estate which I am or shall or may be entitled to under the will of my late uncle." And he bequeathed the residue of his personal estate to the Plaintiff. Between the date of the will and the time of his death he received from the estate of his uncle £800, and invested part of it in the purchase of a sum of £600 railway stock. He had previously purchased other sums of the same stock with his own money, and at the time of his death these sums, and the £600, remained standing as one sum in his name.

Held, that the £600 stock passed under the gift to the Defendants.

Statement.

THIS was a special case stated for the opinion of the Court under the Act 13 & 14 Vict. c. 35.

The case stated as follows:—

John Morgan, by his will, dated the 6th of June, 1873, devised and bequeathed to his wife (the Plaintiff) and the Defendant *G. D. Thomas*, the sum of £200 *Bristol and Exeter Railway* stock, upon certain trusts therein mentioned. And he gave, devised, and bequeathed unto and to the use of the Defendants *Juliana Morgan*, the elder, and *G. D. Thomas*, their heirs, executors, administrators, and assigns (*inter alia*), "all the real and personal estate which I am or shall or may be entitled to under the will of my late uncle *John Morgan*, deceased," upon certain trusts therein mentioned for the benefit of the four other Defendants, who were infants. And the testator bequeathed (*inter alia*) the sum of £320 stock of the *Bristol and Exeter Railway Company* to the Plaintiff and the Defendant *G. D. Thomas*, upon certain trusts therein mentioned. And the testator also bequeathed (*inter alia*) the sum of £280 stock of the *Bristol and Exeter Railway Company*, and all the rest, residue, and remainder of his personal estate (subject to the payment of his debts and funeral and testamentary expenses) unto his wife (the Plaintiff) for her absolute benefit. And he appointed his wife and the Defendant *G. D.*

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Thomas executrix and executor of his will. At the date of the will the testator held £1000 stock of the *Bristol and Exeter Railway Company*, and no more. In February, 1874, he purchased the further sum of £2500 of that stock. In March, 1874, the testator received from the estate of his uncle *John Morgan*, the sum of £800, part of his share in that estate. In April, 1874, the testator, with part of the £800, purchased a further sum of £600 stock of the same company. On the 16th of June, 1875, he made a codicil to his will, in which he stated that he had invested part of the proceeds of the sale of some other property in the purchase of £2500 stock of the *Bristol and Exeter Railway Company*, and bequeathed that sum of stock to the Plaintiff and the Defendant *G. D. Thomas*, upon certain trusts therein mentioned. The testator died on the 3rd of February, 1876. At the time of his death he was possessed of £4100 stock of the *Bristol and Exeter Railway Company*, composed of the three sums of £1000 £2500, and £600 already mentioned.

Statement.

The questions submitted for the opinion of the Court were, 1, whether the £600 stock formed part of the residue of the testator's estate, or whether it formed part of the bequest on trust for the four infant Defendants. 2. In what manner the costs of the application to the Court were to be provided for.

Cookson, Q.C., and *Romer*, for the Plaintiff:—

Argument.

The gift to the Defendants is specific: *Bothamley* v. *Sherson* (1). As, therefore, the testator received part of his share of his uncle's estate, and mixed it with moneys of his own, not investing it separately, or appropriating it in any way, the doctrine of ademption applies to that which was so dealt with: *Lee* v. *Lee* (2); *Oliver* v. *Oliver* (3); *Gardner* v. *Hatton* (4).

[FRY, J.:—In the last case there was a gift of a mortgage debt; when the mortgage was paid off the subject-matter of the gift was gone.]

The money ceased to be money invested on the mortgage, and so in the present case the share of the uncle's estate ceased to be

(1) Law Rep. 20 Eq. 304, 308.
(2) 27 L. J. (Ch.) 824.
(3) Law Rep. 11 Eq. 506.
(4) 6 Sim. 93.

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FRY, J. 1877 MORGAN v. THOMAS. Argument.

outstanding. The principle is also illustrated by *Ashburner* v. *Macguire* (1); *Clark* v. *Browne* (2); *Barker* v. *Rayner* (3); *Hambling* v. *Lister* (4); *Theobald* on Wills (5). The words of the gift are not wide enough to carry the proportionate part of the stock which was bought with money received by the testator from the uncle's estate: *Moore* v. *Moore* (6); *Le Grice* v. *Finch* (7). As soon as the testator received the money from his uncle's executors he was no longer entitled to it under the uncle's will; he was entitled to it as his own property.

[FRY, J.:—May I not, for the purpose of description, look at the date of the will?]

The case resembles a gift of an outstanding debt which has ceased to be outstanding when the will comes into operation; the testator bequeathed only the right to get in the property.

[FRY, J., referred to *Cole* v. *Scott* (8).]

The question is what passes by the gift at the time when it comes into operation? After the investment in *Bristol and Exeter* stock, the property ceased to answer the description in the will. If the Defendants are right, the money might be followed even if land had been purchased with it. [They referred also to *Morrice* v. *Aylmer* (9).]

Kekewich, Q.C., and *L. Bird*, for the Defendants, were not heard.

Judgment.

FRY, J:—

I have felt some doubt as to the true construction of this will, but I have come to the conclusion that the Plaintiff is not entitled to the £600 stock in question. [His Lordship read the will and stated the facts, and continued:—] The question appears to me to be primarily one of construction. What is the meaning to be fairly attributed, as a matter of construction, to the words which I have read? Now two constructions have been suggested in the argument. The one is a construction which makes it necessary that

(1) 2 B. C. C. 108.
(2) 2 Sm. & Giff. 524.
(3) 5 Madd. 208; 2 Russ. 122.
(4) Amb. 401.
(5) Page 42.
(6) 29 Beav. 496.
(7) 3 Mer. 50.
(8) 16 Sim. 259; 1 Mac. & G. 518.
(9) Law Rep. 7 H. L. 717; Ibid. 10 Ch. 148.

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the personal estate which is to pass by the bequest should be personal estate in the very condition in which it reached the testator's hands from the estate of his uncle against which he had the claim; in other words, it would apply, in this instance, to money only, to the £800 only whilst it remained money. The other possible construction of the words is this—that it is a bequest of personal estate derived from the testator's interest under the will of his uncle, in whatever form it may exist, if it be distinguishable. It will be observed that the effect of the first construction would be, in a large proportion of cases, to render such a bequest nugatory, because an estate is generally wound up within no very long period of time after the testator's death, and a legacy usually reaches the legatee in the form of cash, and it is not usual for persons to retain considerable sums of cash uninvested. Therefore, if I hold that the investment of the sum which reached the testator's hands from the estate of his uncle prevents the bequest from operating, I shall be adopting a construction which it is highly probable will defeat the bequest. If, on the other hand, I put the larger, and, if you will, laxer construction on the words so as to make them apply to personal estate derived under the will of the uncle in whatever form it may be found at the death of the testator, provided only that it be distinguishable from the rest of his estate, I adopt a construction which I think will more probably give effect to the intention of the testator as expressed in his will. Holding the latter to be the more probable of the two constructions, and to be one which the words will fairly allow, I come to the conclusion (though not without some hesitation) that it is the true meaning of the testator's will. And if it be the true meaning, the only remaining question is, whether the legacy from the uncle—the £800—is capable of being followed to the extent of the £600 stock. It is admitted by the Plaintiff and the Defendants that it is, for the special case states that the £600 stock arose from the £800 which was derived from the testator's uncle's estate by virtue of the interest which was vested in the testator at the time when he made his will. I therefore hold that the £600 stock passed by the bequest to the Defendants as part of the property answering the description. No question of ademption therefore arises, and it is not necessary for me to consider the

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FRY, J.
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authorities relating to that. I must answer the first question by saying that the sum of £600 stock does not form part of the residue of the testator's estate, but forms part of the personal estate to which he was entitled under the will of his uncle *John Morgan*. The costs will be paid out of the residue of the testator's estate. I should add that I am confirmed in the view that I have taken by the decision of Lord *Romilly* in *Moore* v. *Moore* (1).

Solicitors for all parties: *Clarke, Woodcock, & Ryland*, agents for *A. H. Wansey, Bristol.*

(1) 29 Beav. 496.

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Ex parte FURBER.[1] *In re* PELLEW.

C. J. B. 1877 May 7, 14.

Bankruptcy—Liquidation by Arrangement—Creditor under Bill of Sale repeatedly renewed—Receiver appointed under Bankruptcy Petition—Rights of Liquidation Trustee.

In order to secure an advance by *F.* to *P.*, the liquidating debtor, a bill of sale of part of *P.*'s property was on the 30th of March, 1876, executed by *P.* to *F.* on the agreement that the deed should not be registered for six (and afterwards for nine) months, if *P.* would execute a new bill of sale when called upon to do so. Accordingly, at intervals of about twenty-one days, the bill of sale was renewed fourteen times, the fifteenth and last deed being executed on the 11th of January, 1877. The first and last only of the series were stamped, and the last only was registered. Each deed recited a loan at the date of the deed of the amount purported to be thereby secured; but in fact there was only one loan, increased on two occasions by further advances.

In the interval, that is to say, on the 26th of September, 1876, the debtor committed an act of bankruptcy by neglecting to satisfy a summons served by *B.*, a debtor; and on the 6th of December *B.* served on the debtor a petition for adjudication in bankruptcy, under which a receiver was appointed on the 9th of December. The petition for liquidation was filed on the 18th of January, 1877; and on the 5th of February, *F.*, the bill of sale holder, purchased and took an assignment of the debt of *B.*:—

Held, that whatever might be the validity of the bill of sale of the 11th of January, 1877, at law, it was wholly invalid in bankruptcy, on the grounds that it purported to convey property which was then vested in the receiver; 2, that it was based on an untrue recital; and, 3, that it was part of a scheme to defeat the operation of the bankruptcy laws; and that the title of the trustee in liquidation related back to the act of bankruptcy under the debtor's summons:

Held, further, that the purchase by the bill of sale holder of the summoning creditor's debt, though it might purge the act of bankruptcy as between the debtor and creditor, could not abrogate the proceedings in bankruptcy, so as to defeat the rights of the other creditors.

Statement.

THIS was an appeal from an order of the Judge of the County Court of *Sussex*, held at *Brighton* on the 28th of March, 1877, whereby it was declared that the bill of sale dated the 11th of January, 1877, below mentioned, was null and void against the trustee in the liquidation and the liquidation debtor, and that the goods, chattels, and effects comprised in the bill of sale belonged to and formed part of the property of the debtor at the commencement of the liquidation; and now belonged to the trustee.

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C. J. B. 1877 *Ex parte* FURBER. *In re* PELLEW. Statement.

The following were the dates of the transactions:—

On the 30th of March, 1876, *William Furber*, of the firm of *Furber & Price*, auctioneers, advanced to the debtor, *Gordon Humphry Langford Pellew*, a sum of about £740 upon the security of a bill of sale of that date for £850, made between the debtor of the one part, and *Furber & Price* of the other part, of certain goods and chattels at No. 7, *First Avenue, Brighton*, not being the whole of the debtor's property. The deed was stamped, but there was a parol agreement that it should not be registered for six months if the debtor agreed to give fresh bills of sale when called upon.

This bill of sale was renewed without further advance on the 19th of April, 9th of May, 30th of May, and 19th of June, 1876.

On the 31st of July it was renewed for a further advance of £190, and made to secure £1050.

On the 4th of August the debtor executed a bill of sale for £175 to *Henry Ronald Stevenson*, who had notice of the prior charge.

On the 21st of August *Furber's* bill of sale was again renewed.

On the 4th of September a debtor's summons for upwards of £50 was served on the debtor by *Andrew Bowring*, of *Bowring, Allison, & Daniell*, hosiers, *Brighton*.

On the 11th of September *Furber's* bill of sale was again renewed.

On the 26th of September the debtor committed an act of bankruptcy by neglecting to pay, or secure or compound for *Bowring's* debt.

On the 30th of September the six months above mentioned expired, and the money due to *Furber* not being paid, *Price*, of the firm of *Furber & Price*, came down and put a man in possession; whereupon the debtor paid *Price* £55, and it was arranged that *Furber's* bill of sale should be renewed for another three months.

On the 2nd and the 23rd of October *Furber's* bill of sale was again renewed.

On the 10th of November *Stevenson's* bill of sale was renewed for £220, without any further advance.

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On the 13th of November *Furber's* bill of sale was again renewed.

On the 25th of November a debtor's summons for £51 15*s.* 6*d.*, which had been issued on the 13th, was served on the debtor by *Lewis Morris.*

On the 4th of December *Furber's* bill of sale, and on the 5th *Stevenson's*, were again renewed.

On the 6th of December judgment was recovered by *Bowring, Allison, & Co.*, against the debtor for £307 15*s.* 1*d.*; and on the same day a petition for adjudication in bankruptcy was served on him, which had been signed by *Charles Allison*, on behalf of the firm, on the 4th of December.

On the 9th of December a receiver named *John Vale* was appointed under Messrs. *Bowring's* petition, and a man was placed in possession by *Vale* on the 13th of December.

On the 17th of December the debtor committed an act of bankruptcy on *Morris's* debtor summons.

On the 21st and 25th of December respectively *Furber's* and *Stevenson's* bills of sale were again renewed.

On the 23rd of December a petition for adjudication was filed by *Lewis Morris*, and served the same day.

On the 29th of December *Bowring's* petition came on to be heard, and the hearing was adjourned to the 10th of January, 1877.

On the 30th of December the further three months expired, and *Furber & Price's* debt not being paid, possession was, on the 3rd of January, without the knowledge of the receiver, taken by *Furber* under his bill of sale of the 21st of December; and on the 4th of January, 1877, by *Stevenson*, under his bill of sale of the 25th of December.

On the 6th of January a third debtor's summons, which had been issued on the 2nd by *Evan Ortner* for £300 8*s.* 6*d.*, was served on the debtor.

On the 9th of January the sheriff went into possession under an execution at the suit of some other creditor, and was paid out by the debtor with a sum of £228. This transaction was not mentioned to *Furber & Price.*

On the 10th of January the hearing of *Bowring's* and of *Morris's* petitions was again adjourned to the 24th.

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C. J. B. 1877 *Ex parte* FURBER. *In re* PELLEW. Statement.

On the 11th of January *Furber's* bill of sale was again renewed for £1115 5*s*. This, the fifteenth and last bill of sale, was, like the first, stamped, and was the only one of the series that was registered; and on the following day *Stevenson's* bill of sale was renewed for the fifth time; and this (sixth) bill of sale to *Stevenson* was also stamped and registered.

On the same 12th of January the sheriff entered under executions by *Ortner*, and other creditors, and seized the goods.

On the 18th of January the debtor filed a petition for liquidation by arrangement; and on the 19th injunctions were granted, restraining the execution creditors, and also restraining proceedings under the bankruptcy petitions.

On the 24th of January the hearing of *Bowring's* and of *Morris's* petitions was further adjourned to the 15th of February.

On the 5th of February *Furber* purchased *Bowring's & Morris's* debts, and by assignments of that date, the debts were assigned to *Furber* with power of attorney to sue in the names of *Bowring & Morris*.

On the 13th of February, at a meeting of creditors, liquidation resolutions were passed, and Mr. *Frederick George Clark* was appointed trustee.

On the 15th of February, to which day the hearing of *Bowring's* and *Morris's* petitions had been adjourned, the petitioning creditors did not attend. On the same day injunctions were granted restraining *Furber's* and *Stevenson's* executions until the 17th of February, 1877. Also, on the same day, an application made by solicitors, in the name of *Bowring & Co.*, on behalf of *Furber*, the assignee of the debt, to cancel the order of the 9th of December appointing the receiver, was heard, and ordered to be adjourned.

On the 16th of February the liquidation resolutions were registered.

On the 17th of February the above application to rescind the order of the 9th of December was refused.

On the same day *Vale*, the receiver, was relieved from possession by Mr. *Clark*, the trustee.

The bill of sale, dated the 11th of January, 1877, was made between *Pellew* of the one part, and *Furber & Price* of the other part. It recited as follows: "Whereas the said *G. H. L. Pellew*

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is possessed of certain household goods, furniture, and effects, which are now in his dwelling-house, 7, *First Avenue, Queen's Gardens, Brighton*, aforesaid, and being desirous of borrowing the sum of £1115 5*s*. has applied to the said *W. Furber* and *R. Price* to lend him the same, which they have agreed to do, upon having such security as is created by these presents: And whereas the said *W. Furber* and *R. Price*, in pursuance of the said agreement, have this day lent to the said *G. H. L. Pellew* the sum of £1115 5*s*., the receipt of which the said *G. H. L. Pellew* doth hereby admit and acknowledge." Then followed the conveyance, with a proviso that in case *Pellew* should pay to *Furber & Price* the sum of £1115 5*s*. "on the 12th day of January, 1877, or earlier than such day" if *Furber & Price* should demand payment thereof, the indenture should cease, determine, and be void. Then followed a power of sale on default, and also a power to *Furber & Price* "forthwith" to enter and sell, notwithstanding the time for payment should not have arrived.

In the examination of Mr. *Furber* and Mr. *Pellew* at a private sitting in the liquidation proceedings on the 3rd of March, 1877, it was explained that the reason why the debtor, who in March, 1876, only received £758 1*s*. 10*d*., was charged £850, was to cover the interest for the advance, which was to be at £20 per cent. per annum for six months, and expenses.

The following document also was put in evidence, which was signed by Mr. *Pellew* on the occasion of his executing the bill of sale of the 11th of January:—

"2, *Warwick Court*,
"*Gray's Inn, London*,
"11 Jan. 1877.

"To Messrs. *William Furber & Robert Price.*

"Gentlemen,—In consideration of your allowing me to execute a new bill of sale, in lieu of registration, for an amount to include the principal sum already advanced by you, and the amount now due for costs, possession money, and other expenses, I hereby undertake and declare that the giving by me, and the acceptance by you, of such new bill of sale, shall not in any manner prejudice the possession taken by you of my furniture and effects under the former bill of sale, and that you shall be at liberty to remain in

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C. J. B. 1877 *Ex parte* FURBER. *In re* PELLEW.

possession and to take all such other steps in pursuance of such possession as you could have done if such new bill of sale had not been executed by me, or as if such possession had been taken under the present bill of sale, on the happening of some event on the occurrence of which such possession is authorized to be taken.

"*Gordon H. Pellew.*"

Statement.

The learned County Court Judge held the bill of sale of the 11th of January to be null and void on the grounds that no consideration passed on that occasion, and that it was given for the purpose of defeating the rights of the creditors. If *Furber & Price* knew of the entry by the sheriff on the 9th of January they must have known that the debtor was in difficulties; if they did not know of it they were only in colourable, not actual, possession of the goods, and colourable possession under an unregistered bill of sale would not be good. His Honour held that an act of bankruptcy was committed on the 26th of September, that such act of bankruptcy vested the goods in the liquidation trustee, and that they were not divested again by any act of *Furber* in buying up the debts of *Bowring & Morris*. From this decision *Furber* appealed.

Argument.

De Gex, Q.C., and *Finlay Knight*, for the Appellant:—

It is established by *Smale* v. *Burr* (1) and *Ramsden* v. *Lupton* (2) that a series of unregistered bills of sale, ending in one that is registered, though it may be an evasion of the *Bills of Sale Act*, is not invalid.

No doubt in *Ex parte Cohen* (3) it was held that the last of such a series was invalid and an act of bankruptcy, but why? Because it purported to convey all the goods and stock-in-trade of the debtor. The present bill of sale was not a conveyance of all the debtor's property, hence not an act of bankruptcy, having been given for good past consideration and registered.

As to the two former acts of bankruptcy, which consisted in failing to satisfy the debtor's summonses, petitions for adjudication were presented on both, but before adjudication the bill of sale holder took an assignment of both debts, and both the summoning

(1) Law Rep. 8 C. P. 64. (2) Law Rep. 9 Q. B. 17.
(3) Law Rep. 7 Ch. 20.

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C. J. B. 1877 *Ex parte* FURBER. *In re* PELLEW. Argument.

creditors were satisfied. No adjudication can now take place on either. In *Ex parte Pulbrook* (C. J. B. Jan. 22, 1877), an unregistered bill of sale holder paid off the creditor on whose summons the act of bankruptcy had been committed, and it was held in this branch of the Court that the act of bankruptcy was purged by payment of the debt, and could not be resorted to afterwards. If the summoning creditor be satisfied, no one can avail himself of the act of bankruptcy; and, *semble*, the title of the trustee under a subsequent adjudication will not relate back to such an act of bankruptcy: *Ex parte Wier* (1).

Possession taken by the receiver cannot prevail against possession taken under the bill of sale. If the creditor who has obtained the appointment of the receiver goes to the Court and says he has settled with the debtor, he has a right to have the receiver discharged: *Ex parte Jay* (2).

Pollard, and *E. C. Willis*, for the trustee in liquidation:—

The receiver went into possession on the 13th of December, 1876, which was a week before the execution of the bill of sale of the 21st of December, under which *Furber* took possession.

But, in truth, that bill of sale, and every other executed by *Furber*, was invalid, because at the time when each was given there was an agreement that it should not be registered. Moreover, when the last bill of sale (which was registered), the subject of this order, was executed, it was accompanied by a condition as to possession, which was "a defeasance or condition" prejudicially affecting the rights of the grantee, and hence requiring registration under the 2nd section of the *Bills of Sale Act: Ex parte Southam* (3); *Ex parte Collins* (4). The non-registration of this condition rendered this instrument null and void to all intents and purposes.

[BACON, C.J.:—I am not with you on that point. I cannot consider this such a defeasance of the bill of sale as would require registration.]

Each of these fifteen documents was in the same form, and each, except the first, contained a false recital that the mortgage was

(1) Law Rep. 6 Ch. 875.
(2) Ibid. 9 Ch. 133, 136.
(3) Law Rep. 17 Eq. 578.
(4) Ibid. 10 Ch. 367.

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made for a present advance; whereas it is now admitted that the second bill of sale was given for no fresh advance, but merely as a renewal of the first, for the purpose of evading registration. True it is this second deed was not stamped, but an unstamped deed may be used as evidence of its fraudulent character: *Reg.* v. *Gompertz* (1); *Ponsford* v. *Walton* (2).

The decision in *Ramsden* v. *Lupton* (3) does not apply. There it was held that the last of a series of bills of sale was good, but that it cancelled all the former bills of sale. *Furber's* possession was founded upon a bill of sale of the 21st of December, which, according to *Ramsden* v. *Lupton*, was cancelled on the 11th of January. In *Ramsden* v. *Lupton* the execution was after the registration of the bill of sale, not before; and there was no act of bankruptcy, nor, indeed, any question arising under the bankrupt laws: *Ex parte Stevens* (4); *Stansfeld* v. *Cubitt* (5).

In *Richards* v. *James* (6) it was held that the security of an unregistered bill of sale is displaced altogether by a subsequent execution. Here there was a seizure by the sheriff on the 9th of January. No doubt he was afterwards paid off, but the seizure had the effect of breaking the chain of securities.

Besides this, the receiver went into possession on the 13th of December, and so remained until the 17th of February. The act of bankruptcy, upon which the receiver's possession was founded, must be judged of as it stood at the time of taking possession; it cannot be affected by dealings afterwards, such as the purchase of the debt by *Furber*. Sub-sect. 6 of sect. 25 of the *Judicature Act*, 1873, relates only to absolute assignments of debts of which "express notice in writing" shall have been given to the debtor. No such notice was given to the debtor in this case.

De Gex, in reply:—

The bill of sale was not an act of bankruptcy, as in *Ex parte Cohen* (7) and *Ex parte Stevens*. It has not been assailed as having been a fraudulent preference. It is not void under the *Bills of Sale Act*, because it has been duly registered.

(1) 16 L. J. (Q.B.) 121.
(2) Law Rep. 3 C. P. 167.
(3) Ibid. 9 Q. B. 17.
(4) Law Rep. 20 Eq. 786.
(5) 2 De G. & J. 222.
(6) Law Rep. 2 Q. B. 285.
(7) Law Rep. 7 Ch. 20.

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The Respondents are driven to say the case is not within *Ramsden* v. *Lupton* (1). Why not? The argument of *Bramwell*, B. (2) applies precisely to the case. The first bill of sale, in this instance, was stamped, and hence may be given in evidence.

If the bill of sale had been a conveyance of all the debtor's property it might have been an act of bankruptcy; but a bill of sale, even of all a man's property, given in fulfilment of a past promise made at the time of an advance to give a bill sale at a future day if and when required, is not an act of bankruptcy, though there be no advance when the bill of sale is executed: *Harris* v. *Rickett* (3).

Argument.

Then can this bill of sale be overridden by these two acts of bankruptcy, both being acts of bankruptcy of a particular kind—namely, defaults to satisfy debtor's summonses? It has never been held that there can be a relation back to an act of bankruptcy founded on default to satisfy a debtor's summons. Such an act of bankruptcy is available only to the Petitioner, it is not available to any other creditor—not, in this instance, to the liquidation creditor.

Ex parte Jay (4) is in our favour.

BACON, C.J.:—

Judgment.

In this case there is one thing perfectly clear, and that is, that the facts to which I have to apply the law are free from doubt.

On the 18th of January, 1877, a liquidation petition was filed by Mr. *Pellew*, and that petition was unquestionably an act of bankruptcy. The trustee appointed under that petition is entitled, as I conceive—and I entertain no doubt whatever about it—to enjoy the title by relation back to all acts of bankruptcy which had been before committed by the debtor. On that day in January the title of the trustee commenced. What was the state of things then? At that time acts of bankruptcy had unquestionably been committed by the debtor. Debtor's summonses had been served, and two petitions for adjudication had been filed against him, alleging his non-obedience as acts of bankruptcy. Then, on the 9th of December, in the very beginning of the

(1) Law Rep. 9 Q. B. 17.
(2) Ibid. 28, 29.
(3) 4 H. & N. 1.
(4) Law Rep. 9 Ch. 133.

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proceedings, a receiver is appointed. What is the effect of appointing a receiver? It is impossible that it can be expressed in clearer and plainer terms than those which have been used by Lord *Selborne*, L.C., in the case of *Ex parte Jay* (1), which has been referred to. It is unnecessary that I should read the words again, as the case is familiar to everybody, but the decision is to the effect that a receiver is appointed in order that the debtor's property may be retained for the benefit of all the creditors, and whether the receiver receives it with his own hands, or merely possesses it, and does not by form exercise the title, yet, as long as he has got it, he is nevertheless the receiver of the whole of the debtor's estate; and the title relates back to the act of bankruptcy, which, in this instance, was the default in the case of *Bowring* (it is not necessary that I should mention the other cases).

Then I have to consider whether the complicated transactions between Messrs. *Furber & Price* and the debtor, which consisted in these successive bills of sale down to the very last, which is dated the 11th of January, 1877, can avail against the title of the trustee in bankruptcy. I think it is quite clear that they cannot. It is unnecessary to go into the consideration of the differences which seem to have prevailed between the decisions at common law and in bankruptcy with regard to the granting of several successive bills of sale. The law laid down in the Court of Bankruptcy (which is a branch of the Court of Chancery) has been that it is unnecessary to consider the decisions at common law. The decisions at law may very well stand, and I have not a word to say against them, but the construction put by the bankruptcy law is very plain, and it is, that these contrivances by successive bills of sale are wholly invalid.

It has been said that the bill of sale of the 11th of January, 1877, was a good bill of sale, because it was registered; but what is it that has been registered? It purports to be an assignment of the debtor's property. But he had no property to assign. The receiver was the legal owner of all his property, and all that the grantee of the bill of sale could take was what would remain when the receiver's rights had been satisfied and the debtor discharged,

(1) Law Rep. 9 Ch. 133.

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as is pointed out by Lord *Selborne* in the plainest possible manner. Whether the money or any of it had been received by the receiver in that case, does not signify in the slightest degree. The creditor possessed himself of money which belonged to an estate which was not his, but which the law had destined to a different application. Now that is precisely what Messrs. *Furber & Price* seek to do here under a bill of sale, which, if it had no taint on it—and I think it is very much tainted—would give them no right as against the receiver. The learned Judge of the County Court held that the title of the receiver was to prevail over that of the bill of sale holder, and every case referred to establishes the title by relation back. Whether the execution of this deed was an act of bankruptcy or not is unimportant. It is a dealing with the debtor by *Furber & Price*, who take from the debtor under an untrue recital—for it is a wholly untrue one—an assignment of that which the debtor had not to assign, and which was then by law vested in the receiver.

That is the whole case, and it is unnecessary (although I do not complain of the time that has been consumed in so doing) to go through the history of the bills of sale and the contrivances by which *Bowring's* and *Morris's* petitions were made to stand over, and whereby in every interval another bill was taken and not registered, and least of all can it be important that the debt of the summoning creditor has since been satisfied. It may be true that, as between the debtor and the creditor, the payment of the sum mentioned in the summons may have had the effect of purging the act of bankruptcy committed by non-obedience to the summons, but that has nothing to do with the case when a petition has been filed and the law applied to for the liquidation of the affairs of the debtor by arrangement.

The petitioning creditor says, "This man has committed an act of bankruptcy, take possession of his estate, and administer it for the benefit of the creditors." The act of bankruptcy is not purged by his accepting payment of the debt. No man can be justified in accepting payment of a debt, in order to abrogate those proceedings which the Court of Bankruptcy has taken, and to defeat the rights of other creditors, because that is what he is doing. He is selling their rights by taking payment of the money. I

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entertain no doubt that the title of the trustee relates back to the earliest act of bankruptcy proved in these proceedings. I am of opinion that the bill of sale is wholly a nullity, and even if it were proved that a loan of £1100 which is mentioned in the bill of sale was laid down on the table on that day, it would have been no less invalid, and it is no more respectable because it is a fund of £1100, composed partly of a debt of £800, and partly of subsequent advances made by the grantee of the bill of sale. The bill of sale holder knew perfectly well the condition of the debtor, and knew perfectly well that every step they were taking in concert together had for its object the defeat of the bankruptcy laws, and of proceedings which were, in my opinion, unimpeachable.

There is no ground whatever for the appeal, and it must be dismissed.

Solicitors for Appellants: *Deane, Chubb, & Co.*

Solicitors for Respondents: *Lumley & Lumley*, agents for *Nye, Brighton.*

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MACDONALD *v.* FOSTER.

C. A.
1877
V.-C. H.
May 3, 8.
C. A.
June 9.

[1875 M. 29.]

Practice—Sale under Direction of the Court—District Registry—Judicature Act, 1873, *ss.* 62, 66—*Rules of Court*, 1875, *Order xxxv., rr.* 1, 2, 4.

Where a decree in an administration action directed the accounts to be taken in a District Registry, and the real estate to be sold with the approbation of the Judge, Vice-Chancellor *Hall* directed that the sale should take place in his Chambers :—

Held, by the Court of Appeal, that although it might have been more convenient that the sale should take place in the District Registry, yet the place and manner of the sale was a matter entirely within the discretion of the Judge, and refused to interfere with his exercise of such discretion.

Statement.

THIS was an administration action, commenced in the *Liverpool* District Registry.

The action was heard before Vice-Chancellor *Hall* on the 25th of February, 1876; and by his Lordship's judgment the usual accounts and inquiries were directed, but were to be taken and made by the District Registrar. The judgment also directed a sale of the testator's real estate, with the approbation of the Judge, and that the proceeds should be brought into Court in the usual way; and further consideration of the action was adjourned until the District Registrar should have made his report.

The report of the District Registrar was filed on the 15th of December, 1876, and all parties being desirous that the sale should be conducted in the District Registry instead of in the Judge's Chambers, the Plaintiff filed an affidavit by his solicitor to shew that the sale would, from the condition of business in the Chambers of the Vice-Chancellor and in the District Registry respectively, take place much sooner if it was conducted in the District Registry; that delay would be likely to prejudice the sale; and that the sale could be duly carried out in the District Registry, and the purchase-money paid in to the *Liverpool* branch of the *Bank of England*, under a minute issued by the Treasury to the District Registrars on the 1st of April, 1876.

Argument.

May 3. *Bardswell*, for the Plaintiff, now moved that the sale might be conducted before the District Registrar at *Liverpool*.

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He submitted that sect. 62 of the *Judicature Act* of 1873, and Rules of Court, 1875, Order XXXV., rule 4, gave the Court jurisdiction to make the order if the circumstances of the case justified it: and that the evidence in support of the application took the case out of the principle of *Irlam* v. *Irlam* (1). He admitted, however, that no such order had hitherto been made.

North, Q.C., for the trustees of the will, and

Oswald, for beneficiaries having liberty to attend the proceedings, supported the application.

HALL, V.C., reserved his judgment in order that he might inquire into the state of business in his Chambers.

Judgment, V.-C. H.

May 8. HALL, V.C.:—

I have inquired into the state of business in my Chambers, and I find that no such delay as that anticipated is likely to take place, but that the matter may be speedily carried through if the proper steps are taken. Considerable delay has already taken place, and advantage might have been taken of the time which has elapsed between the decree and the filing of the Registrar's report to take the steps usually adopted in Chambers by preparation of the abstracts, and otherwise to facilitate a sale as soon as possible after the certificate. The decree directed the sale to take place before the Judge in Chambers, and if the proper course had been adopted the sale might have been taking place in Chambers now.

The Treasury order referred to in the affidavit in support of this application has nothing whatever to do with it, but only deals with fees and moneys collected by the Registrar, which are thereby directed to be placed to particular accounts.

The convenience of having the sale carried out in the ordinary way in Judge's Chambers is very great, and quite outweighs any advantage to be derived from its taking place in the country, especially in this particular case, in which there has already been such unaccountable delay.

That is the general practice; and unless there are any special

(1) 2 Ch. D. 608.

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circumstances which make it desirable to alter the practice in a particular case, I shall not order a sale to take place otherwise than in Chambers. When it takes place there, the Judge is accessible from time to time, in case points arise with reference to settling the conditions of sale or otherwise; whilst if conducted in the country, occasional and probably frequent applications to the Judge in a far less convenient manner may be necessary in reference to the proceedings. Every consideration of convenience, therefore, seems to be in favour of the sale taking place in Chambers; and moreover, if the previous proceedings in this case are an example of the speed with which matters are conducted in District Registries, I am satisfied that it will also be more quickly carried out in Chambers than in the country.

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From this order the Plaintiff appealed. The appeal was heard on the 9th of June.

C. A.

Ince, Q.C., and *Bardswell*, appeared before the Court of Appeal for all parties:—

Argument.

It will be more convenient for all parties that the sale should take place in the District Registry, and the Court has full jurisdiction to make the order under the *Judicature Act*, 1873, s. 62. It is the right of the suitors to have the proceedings carried on in the District Registry, unless the Court for some special reason thinks it inexpedient: Rules of Court, 1875, Order xxxv., rr. 1 and 2. If it is a matter of discretion for the Judge, the Court of Appeal has power to review his exercise of such discretion.

JESSEL, M.R.:—

Judgment, C. A. Jessel, M.R.

I do not understand that the Vice-Chancellor laid down any general rule upon the subject. My own practice is generally to order such sales as this to take place in the country whenever it is practicable; and in the present case I should probably have ordered the sale to take place at *Liverpool*. But it is a matter entirely within the discretion of the Judge, which this Court ought not to interfere with. The appeal must therefore be dismissed, but the costs of the parties both before the Vice-Chancellor and in the Court of Appeal will be costs in the cause.

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JAMES, L.J.:—

I think it would have been more convenient in this case to have the real estate sold at *Liverpool;* but it is a matter entirely within the discretion of the Judge.

BAGGALLAY, L.J., concurred.

Solicitors: *Cleaver & Holden, Liverpool; Crook & Smith,* agents for *Greenway, Liverpool.*

C. A. 1877 June 29; July 2, 10.

MILLS *v.* HAYWOOD.

[1873 M. 160.]

Specific Performance—Option to purchase—Condition Precedent—Delay by Purchaser in Possession.

M. became tenant to *A.* of leasehold property for ten years from December, 1861, "*M.* to have the option at any time during the said term to purchase the premises for £3500, and upon payment thereof to *A.* the said term of ten years and the said rent shall thereupon cease, and *M.* shall thereupon be entitled to an assignment." *M.* entered into possession, and afterwards *A.* made a mortgage to *G.* In July, 1867, *M.* gave written notice to *A.* and to *G.* that he elected to purchase. A draft assignment was prepared, which could not be settled, since neither *A.* nor *G.* would assent to the purchase-money being paid to the other of them. A correspondence took place, which ended in March, 1868. *G.* having given notice to *M.* to pay his rent to him, *M.* made to him various irregular payments, for most of which receipts were given expressing them to be on account of rent, and this went on after the end of the term of ten years. In November, 1872, *A.* became bankrupt. On the 1st of May, 1873, the solicitor of *A.'s* trustee in bankruptcy called on *M.*, and stated that the trustee was going to sell, and wished to give him the refusal. *M.* desired time to consider, and did not say that he had already agreed to purchase. On the next day his solicitor discussed the matter with the trustee's solicitor, but did not set up any claim as having purchased. On the 13th of May, however, he wrote to the trustee's solicitor insisting on *M.'s* right under the agreement of 1861 and the notice of July, 1867, and the trustee disputing this right, *M.* filed a bill for specific performance:—

Held (affirming the decision of *Hall*, V.C.), that the option in the agreement of 1861 and the notice of July, 1867, made a binding contract, although the purchase-money was not paid within the term:

Held (reversing the decision of *Hall*, V.C.), that *M.'s* right to specific performance was lost by the delay from March, 1868, to May, 1873, which

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was not excused by his having been in possession; for that possession, in order to have that effect, must be a possession under the contract, and such that the vendor must know, or be taken to know, that the purchaser claims to be in possession under the contract; and in this case the Plaintiff did not, from March, 1868, to May, 1873, claim possession under the contract, nor did it appear that the vendors recognised him, or were bound to recognise him, as claiming possession under it.

Statement.

THIS was an appeal by the Defendant *Taylor*, the trustee in bankruptcy of *H. De Bruno Austin*, from a decree for specific performance made by Vice-Chancellor *Hall*.

In December, 1861, *Austin* was entitled to two houses, 311 and 312, *High Holborn*, for the residue of a term of 63½ years from the 29th of September, 1855, and to No. 72, *Chancery Lane*, for twenty years from the 25th of March, 1858.

On the 23rd of December, 1861, *Austin* entered into a written agreement with *Mills*, the Plaintiff, by which *Austin* was to stand possessed of the property in trust as thereinafter mentioned. *Mills* to become tenant to *Austin* for ten years from Christmas Day, 1861, at the rent of £1000 a year. *Mills* to pay *Austin* £1200 on or before the 25th of March, 1863, for the valuation of stock, fixtures, &c. The 4th clause was as follows: "Mr. *Mills* to have the option at any time during the said term to purchase the above premises for £3500, and such an amount as Mr. *Austin* shall pay for law and other expenses attendant upon the purchase and resale thereof; and upon payment thereof, and of the other sums due under this agreement as hereinafter mentioned, to Mr. *Austin*, the said term of ten years and the said rent of £1000 per annum shall thereupon cease, and the said Mr. *Mills* shall thereupon be entitled to an assignment of the leases." *Austin* was to make certain specified alterations, but was not to be called upon to expend more than £1000, and *Mills* agreed to repay the expense of such alterations, with interest at £10 per cent. from completion till payment; and it was provided that *Austin* should not be called upon to assign the premises to *Mills* till the whole amount due to him for such alterations, and for some alterations which he had already made, should have been paid him.

Mills thereupon entered into possession of the premises, which are now known as the *Radnor Tavern*, and carried on business there as a tavern-keeper.

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C. A. 1877 MILLS v. HAYWOOD. Statement.

Prior to July, 1867, *Mills* offered to purchase at a price of £5000, and to pay £1000 for the debt to *Austin*, but these negotiations led to no result. The sums which would be payable under the purchase clause of the agreement of 1861, including arrears of rent, were in excess of this offer, though the exact amounts did not clearly appear.

In July, 1867, *Mills*, through his solicitors, gave notice by letter to *Austin* and to *Gibbon*, who was a mortgagee by assignment from *Austin* under a deed of the 23rd of January, 1863, stating that *Mills* intended to exercise his option of purchase and was ready to complete the purchase. The letter to *Austin* was dated the 26th of July, 1867, and was as follows:—

"Mr. *Mills* is desirous of exercising his right to purchase the lease of the *Radnor*, and has instructed us to call upon you, as far as you are concerned, to complete the sale, which he is ready and willing to do. We have informed Mr. *Gibbon* and the *National Bank* of this, and if there be any other parties now representing you, be kind enough to hand them this letter."

The *National Bank* were mortgagees from *Austin* subsequent to *Gibbon*, and *Gibbon* had to a certain extent—how far, was matter of controversy—postponed his rights to the bank's security.

The letter to *Gibbon* was similar.

An abstract was sent, requisitions made and answered, and the title accepted. A draft assignment of the property to *Mills* was prepared stating the whole purchase-money at £5000, made payable to *Austin* and *Gibbon*. In December, 1867, this draft was approved on behalf of *Austin* and his inspectors, he having in July, 1867, executed a deed of inspectorship, with an alteration stating that *Gibbon* was paid off, and making the purchase-money payable to *Austin*. *Gibbon* did not approve the draft, which was forwarded to him in January, 1868, his objection, as he stated, being that the draft stated his mortgage to be paid off, and provided for the purchase-money being paid to *Austin*, whereas he insisted on having it paid to him. Although the purchase-money was put at £5000, it was not shewn how this sum was arrived at, or whether it was based on the old offer or on the notice under the purchase clause. Some correspondence went on till March,

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1868, which did not lead to any definite conclusion, and *Mills* gave up a loan of £5000 for which he had been negotiating. In July, 1867, *Gibbon* had given notice to *Mills* to pay his rent to him as mortgagee, and *Mills* paid at irregular times various sums of different amounts, for most of which, as well after as before Christmas, 1871, when the term of ten years mentioned in the agreement of 1861 ended, receipts were given expressing them to be made on account of rent.

In November, 1872, *Austin* was adjudicated bankrupt. *Haywood* was the trustee under his bankruptcy. On the 1st of May, 1873, *Haywood's* solicitor called upon *Mills* and stated that *Haywood* was going to sell the *Radnor*, and wished to give *Mills* the first offer of it. *Mills* said nothing about his having already agreed to purchase, but requested time to consider the matter, and on the next day his solicitor called on *Haywood's* solicitor to discuss the matter. In the opinion of the Court it did not appear that any claim on the part of *Mills* to be already a purchaser was set up at this interview, but on the 13th of May his solicitors wrote to *Haywood's* solicitors distinctly setting up the claim, and stating that if *Haywood* was not prepared to carry out the sale a bill would be filed. *Haywood* disputed *Mills'* right, and commenced, in the name of *Gibbon*, an action for arrears of rent. *Mills*, in July, 1873, filed his bill against *Haywood* and *Gibbon* for specific performance and an injunction. Judgment was given in the action to be dealt with as the Court should direct.

In addition to the above facts *Mills* relied on his having, since 1867, with the knowledge and assent of *Austin* and the Defendants, expended money in improving the property on the faith of his being a purchaser, and he proved that he had in fact expended between £200 and £300 in making a vault. It appeared also that he had made other expenditure on the premises before giving the notice to purchase.

Vice-Chancellor *Hall* made a decree for specific performance, from which *Taylor*, who had been substituted for *Haywood* as trustee in the bankruptcy, and had been made a party by supplemental order, appealed. The appeal was heard on the 29th of June and the 2nd of July.

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Argument.

Hemming, Q.C., and *Yate Lee*, for the Appellant:—

We contend that the relation of vendor and purchaser was not created till the money was paid: *Lord Ranelagh* v. *Melton* (1); and even if it was, the right to specific performance was lost by delay and by the purchaser's not having his money ready: *Gee* v. *Pearse* (2). There is enough in the evidence to establish a case of abandonment, and a good deal to shew that the draft was framed with reference to the prior offer of £5000, and not on the basis of the notice under the purchase clause; but even without this the laches is a bar to the claim.

Hastings, Q.C., and *Nalder*, for the Plaintiff:—

The payment of the purchase-money is not made a condition precedent to the existence of the relation of vendor and purchaser in this case. Delay does not bar, for the purchaser was in possession.

Dickinson, Q.C., and *Whitehorne*, for *Gibbon*.

Hemming, in reply.

Judgment.

July 10. COTTON, L.J., now delivered the judgment of the Court (*James*, *Baggallay*, and *Cotton*, L.JJ.), and after stating the nature of the appeal, continued:—

The first question raised by the Appellant is that there never was any binding contract for sale to the Plaintiff. The facts on which this question depends are as follows:—[His Lordship stated the nature of *Austin's* interest, the agreement of the 23rd of December, 1861, and the Plaintiff's possession under it, and the letters of July, 1867, to *Gibbon* and *Austin*.]

In the opinion of the Court this made a binding contract between the Plaintiff of the one part, and *Austin* and *Gibbon* of the other part, for the sale to the Plaintiff of the leasehold interest in the *Radnor*, to which at the date of the contract of the 23rd of December, 1861, *Austin* was entitled. It was, indeed,

(1) 2 Dr. & Sm. 278. (2) 2 De G. & Sm. 325, 346.

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contended by the Appellant, that until payment of the purchase-money there was no contract. But the 4th clause of the agreement of December, 1861, does not, in our opinion, make payment of the purchase-money a condition precedent to the existence of a contract. It is an offer of the property to the Plaintiff with liberty to him to accept it at any time during his term. When he sent the letters of July, 1867, already referred to, the acceptance therein contained made with the offer in the 4th clause of the agreement a complete contract, and what we have to decide is whether the Plaintiff can now claim the benefit of that contract.

Shortly after the month of July, 1867, disputes arose between *Gibbon* and *Austin* as to the form of the assignment to be executed in pursuance of the contract, and in or before the month of December, 1867, *Gibbon* refused to join in the assignment. The Plaintiff was informed of the fact, and he states in his bill that in consequence he abandoned a negotiation which had been entered into by him for a loan of £5000 which he required to enable him to complete his purchase. Various communications appear to have passed between the parties down to and in the month of March, 1868. Previously to that date the draft of an assignment to the Plaintiff had been approved on behalf of *Austin*, and in this draft the purchase-money had been stated to be £5000. There was considerable discussion whether this sum was properly fixed as the purchase-money payable by the Plaintiff under his contract of purchase. For the purposes of this judgment I will assume without deciding that such was the case. From the month of March, 1868, till some time in the month of May, 1873, the Plaintiff never insisted on performance of the agreement for sale to him. In the month of December, 1871, the term created by the agreement of December, 1861, came to an end, but the Plaintiff still continued in occupation of the *Radnor*. Sometime in the autumn of 1872 *Austin* became bankrupt. On the 1st of May, 1873, the Plaintiff was informed by Mr. *Sheffield*, the solicitor of the trustee in bankruptcy, that he intended to sell the tavern. I must hereafter consider what then occurred. At present it is sufficient to say that on the 13th of May, 1873, and not before, the Plaintiff, through his solicitor, claimed to be entitled to the benefit of the contract of July, 1867. The trustee in bankruptcy disputed the claim of

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the Plaintiff, and in 1873 commenced an action in the name of *Gibbon* against the Plaintiff to recover arrears of rent due for the *Radnor*. The bill was then filed, and in pursuance of an order made on motion for an injunction to stay the action, judgment was given to be dealt with as the Court should direct, and on the 7th of March, 1877, the decree now under appeal was made.

If it were necessary to determine the point, there is considerable ground in the present case for holding that there had been a mutual abandonment of the contract, both sides treating the whole matter as at an end, and dealing with one another accordingly. But it is not necessary to give a decision on that point.

It is a well-established principle, as laid down by Lord *Alvanley* in *Milward* v. *Earl Thanet* (1), that a party cannot call upon a Court of Equity for a specific performance unless he has shewn himself ready, desirous, prompt, and eager.

This rule is specially applicable where the subject-matter of the contract is of a somewhat speculative and fluctuating value, as the tavern, the subject of the present suit, must necessarily be; and the delay which has occurred in the present case from March, 1868, till May, 1873, unless satisfactorily explained, must be fatal to the Plaintiff's title to a decree for specific performance. It was contended that the delay was solely attributable to the disputes between *Gibbon* and *Austin;* but even if this were so, it was the duty of the Plaintiff, if he desired to obtain specific performance, to insist upon, and if necessary file a bill to enforce, specific performance of his contract. Then it is said that the Plaintiff has been in possession, and that a purchaser in possession does not lose by delay his right to specific performance. But possession, in order to obviate the consequence to a purchaser of delay, must be possession under the contract sought to be enforced, that is (to use the words of Lord *St. Leonards* in *Clarke* v. *Moore* (2)), "an enjoyment of the benefits given to him by the contract," and the vendor must have known, or have been bound to know, that the purchaser claimed to be in possession under the contract. In such a case, as, *e.g.*, where the purchaser in possession has no right or title to such possession except as purchaser, his possession is an assertion on his part of his right under the contract of purchase, and acqui-

(1) 5 Ves. 720, n. (2) 1 J. & Lat. 727.

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escence in his possession is a recognition by the vendor of this right. But where a tenant in possession contracts for the purchase of his landlord's interest the case is different. His right under the contract is to be no longer tenant of the vendor, and his possession as tenant is not an assertion of right under the contract of purchase. He may be in possession of the property, the house or land which is the subject of the contract of purchase, but, if he is, he is not in possession of, or asserting right to, the benefit or interest secured to him by the contract.

I must now consider whether from 1868 to 1873 the Plaintiff was in possession as purchaser. The term of the demise to him ended in December, 1871. Both before and after that date payments were made by him to *Gibbon* for which the Plaintiff took receipts usually expressed to be for rent, but sometimes, at least before the year 1871, without any mention of rent. The payments were not quarterly, or of any definite proportion of the year's rent, but varied in amount, being apparently such sums as the Plaintiff was from time to time able to pay. The contention of the Appellant is, that the possession of the Plaintiff was throughout as tenant only, and that down to December, 1871, this was under the demise effected by the agreement of December, 1861, and subsequently as tenant from year to year on the terms of that agreement. The payments as for rent, especially those made after the year 1871, strongly support this view, for although down to the end of the year 1871 the Plaintiff, if he did not pay his purchase-money, was liable during the term to the rent thereby reserved, the 4th clause of the agreement cannot, in my opinion, be construed as a contract by the Plaintiff in the event of his purchasing after the term to pay the rent of £1000 a year till his purchase-money was paid. After the year 1871, if in fact he were in possession as purchaser and not as tenant, he would, on the expiration of the ten years' term, have insisted on his right to be treated as liable only for the purchase-money and interest. But it is said that after the year 1871 the Plaintiff expended considerable sums in constructing a vault, and that he did this on the faith of his being entitled to the property under his contract for purchase. It is proved that he in fact expended between £200 and £300 for this purpose. But the mere fact of this expenditure

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is not sufficient, in my opinion, to shew that he was in possession as purchaser. We have no explanation of the circumstances under which the sum was expended. It is only referred to in the bill under the general terms: "The Plaintiff has, with the knowledge and assent of the said *H. De B. Austin* and the Defendants respectively, from time to time since the year 1867, when the Plaintiff declared his option to become purchaser of the said premises as aforesaid, down to the present time, and as the owner thereof, expended large sums of money in improvements and additions to the said premises." It may well be that the Plaintiff, though yearly tenant only of a tavern for which he paid £1000 a year, trusted to his tenancy being continued, and thought it desirable, or, as the Appellant's counsel suggested in his reply, found it necessary, to construct the vault. But did he incur the expenditure as purchaser, that is, having the contract for purchase present to his mind, and considering himself as entitled in equity to be considered as owner under that agreement? This, in my opinion, is displaced by what occurred in the month of May, 1873. It is not alleged in the bill that either the Plaintiff or his solicitor, at the interviews with *Haywood's* solicitor on the 1st and 2nd of May, set up his title as owner in equity of the property which the trustee was proposing to sell. It is conceded that no such claim was made by the Plaintiff, and I think the result of the evidence is that Mr. *Hayter*, his solicitor, at the interview with Mr. *Sheffield*, *Haywood's* solicitor, on the 2nd of May, did not raise the claim.

Mr. *Sheffield* makes an affidavit, in which he states that the claim was first brought forward by the letter of the 13th of May, 1873, and this is not denied by Mr. *Hayter*, though, as I understand, he makes an affidavit subsequently to that of Mr. *Sheffield*. If the Plaintiff had in fact made the expenditure as owner in equity under a contract of purchase, either he or his solicitor would certainly have insisted on his rights as purchaser as soon as the trustee intimated his intention of selling the property.

In my opinion, the result is that the Plaintiff did not, from March, 1868, till May, 1873, claim to be in possession as purchaser, and there is nothing to shew that the vendors recognised or were bound to recognise his possession as being that of purchaser under

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the contract for sale. In my opinion, therefore, his possession was not such as to prevent the delay which has occurred being fatal to his claim for specific performance.

The Plaintiff, therefore, entirely fails. He has given judgment in the action for rent to be dealt with as the Court may direct. There must be an account of rent due. The bill, therefore, cannot be dismissed. The decree of the Vice-Chancellor must be discharged, and a declaration made that the Plaintiff is not, under the circumstances, entitled to specific performance, and after a recital that the Defendant admits that the sum for which judgment was given exceeds the arrears of rent due, there must be an inquiry as to the rent, with an order for payment of the amount so found due, with interest from the date of the judgment, and the costs of the action.

Solicitors: *Wood, Street, Hayter, & Latham; R. C. Turnbull; Tilley & Soames.*

LUCKRAFT *v.* PRIDHAM.

C. A. 1877 V.-C. H. *April* 24. C. A. *July* 4, 18.

[1876 L. 16.]

Devise to a Charity—Corporation having Power to take Land by Devise before 9 Geo. 2, c. 36—Confirmation by later Acts.

By a statute of Queen *Anne* a corporation was established to provide for the relief of the poor within a certain district, with power to raise money for that purpose, and it was enacted that it might without license in mortmain acquire land by gift or devise, and that any persons might without further license give or devise land to it. After the passing of 9 Geo. 2, c. 36, several Acts relating to this corporation were passed, giving it additional powers, but not referring to the above-mentioned clause as to acquiring land, and in these Acts were contained clauses providing that the clauses and powers of the former Acts should remain in force and be executed as fully as if they were therein re-enacted:—

Held, by *Hall*, V.C., and by the Court of Appeal, that the charity was not exempted from the operation of 9 Geo. 2, c. 36; and that a bequest to it of moneys to arise from the sale of real estate was void.

Perring v. *Trail* (1) distinguished.

Statement.

W. R. PHILLIPS, who died in 1876, gave by will his real and personal estate to trustees upon the usual trusts for sale and con-

(1) Law Rep. 18 Eq. 88.

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version, and directed half the proceeds to be given to the different charities of *Plymouth*, the amounts and the charities to be in the discretion of his trustees, and he gave the other half to the persons therein named.

An order having been made for administration of the estate, an inquiry was added whether any and which of the charities of *Plymouth* were capable of acquiring by will the proceeds of sale of real or leasehold estates or personal estate connected with land, and to what extent in case of each charity (if any) so capable.

Two claims only were made under this inquiry—one by the *Guardians of the Poor of Plymouth*, the other by the *Orphans Aid of Plymouth*. The Chief Clerk certified that the former were capable and that the latter were not. Some of the residuary legatees applied by summons to vary this certificate, and the summons being adjourned into Court, came on with the hearing for further consideration.

The *Guardians of the Poor of Plymouth* were incorporated by an Act passed in the 6th year of the reign of Queen *Anne*, which enacted:—

"That the said mayor, recorder, and other the persons appointed, elected, and constituted by virtue of this Act respectively, shall be and be named and called *Guardians of the Poor of the Town of Plymouth*, in the county of *Devon*, and that they and their successors shall for ever hereafter in name and fact be one body politic and corporate in law to all intents and purposes, and shall have a perpetual succession, and that they shall have a capacity to sue and be sued and impleaded by that name in all courts and places of judicature within this kingdom, and by that name shall and may without license in mortmain purchase, take, or receive any lands, tenements, or hereditaments of the gift, alienation, or devise of any person or persons whatsoever having a right and not being otherwise disabled to grant, alien, or devise the same, who are hereby without further license enabled to give, transfer, grant, or devise any such lands or hereditaments unto or for the use or benefit of the said corporation." The Act gave the corporation power to raise money by rates to a certain amount for the relief of the poor of *Plymouth*.

An Act was passed in the 32nd year of King *George* II. in-

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tituled as an Act to explain, amend, and render more effectual the former Act, and for obliging the Mayor and Commonalty of *Plymouth* to contribute towards the county rates of *Devon*, and for applying for the relief of the poor certain surplus moneys which had arisen by the assessments for raising the land tax in the town. This Act, after reciting the former Act, but not reciting the particular clause above referred to, stated certain inconveniences which had been found to exist about the mode of raising the moneys which the Act authorized to be raised, proceeded: "Therefore for providing proper relief and redress in the premises, be it enacted." It was then enacted that the guardians of the poor should be empowered to raise £2000, and directions were given as to the application of that money. There followed provisions to meet the other particular inconveniences mentioned in the recitals, and after directions as to rating came the following clause:—

"And be it further enacted that the said former Act of Parliament of the said 6th year of Her late Majesty Queen *Anne*, and all and every the clauses, powers, articles, matters, and things therein contained, and not hereby varied, altered, or otherwise explained, shall be and the same are hereby continued, and shall be and remain in force, as fully and effectually as if this Act had not been made; and shall be executed with respect to the matters herein contained as fully and amply as if such clauses, powers, articles, matters, and things were, with such alterations or variations, herein re-enacted with respect to this Act."

In the 26th year of King *George* III. an Act was passed (26 Geo. 3, c. 19) intituled as an Act to amend and render more effectual the two above-mentioned Acts, "and for granting further power to the *Guardians of the Poor of the Town of Plymouth*, in the county of *Devon*." This Act recited the former Acts, not mentioning the above special clause in the first Act, and then proceeded with recitals to the effect that the moneys which could be raised under the powers of the former Acts were insufficient for the purposes of those Acts. Power was then given by sect. 1 to the guardians of levying further rates, so as to make up the total yearly amount to £1500. Sect. 2 gave powers to the justices at

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quarter sessions to sanction certain additional rates. Sects. 3 and 4 contained provisions as to such additional rates. Sect. 5 provided for the expenses of obtaining the Act. Sects. 6 and 7 related to the removal of paupers, and sect. 8 was as follows:—

"And be it further enacted by the authority aforesaid that the said Act passed in the 6th year of the reign of Her late Majesty Queen *Anne*, and also the said Act 32 Geo. 2, and all and every the clauses, powers, articles, matters, and things whatsoever therein contained and not hereby varied, altered, or otherwise explained, shall be and the same are hereby continued, and shall be and remain in force as fully and effectually as if this Act had not been made, and shall be executed with respect to the matters herein contained as fully and amply as if such clauses, powers, articles, matters, and things were with such alterations and variations herein enacted with respect to this Act."

The Act 53 Geo. 3. c. 73, intituled simply as an Act for altering and amending the three former Acts, recited the rating powers in the former Acts, and recited that the number of poor had increased, and from such increase, as well as the increase in the price of provisions, "it is found that the sum of £1500, or so much thereof as hath been or could be levied and raised under the provisions of the said recited Acts, together with the annual income of the real and personal estates entrusted with and vested in the said guardians of the said poor, is greatly insufficient to answer the purposes for which the same were intended, so that large additional rates and assessments are annually wanted to carry the purposes of the said Acts into execution;" and that the guardians had been obliged to borrow and had incurred a considerable debt, and that the payment of the rates was much evaded, and that inasmuch as the powers and provisions of the said Acts, and especially for raising, assessing, levying, and recovering the rates had been found by experience inadequate, and it was expedient that the same should be altered and amended, and that "it would tend to the equalization and better collection of the said rates, if additional powers were given to the said corporation for assessing and collecting such rates; and it was also expedient that the said corporation should be enabled to discharge

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their present debt, and that additional powers should be given to them for employing, maintaining, regulating, and managing the poor under their care agreeable to the purport and intent of the said recited Acts, and that they should be empowered to levy and raise such further yearly sum or sums of money as are hereinafter mentioned;" and that such beneficial purposes could not be effected without the authority of Parliament. The Act then gave additional powers of rating, and contained an elaborate set of provisions as to the assessment, levying, and recovering rates; and by clause 47 it provided that the three former Acts, "and all and every the clauses, powers, provisions, penalties, forfeitures, articles, matters, and things therein contained (save and except such part or parts thereof as are hereby altered, varied, or repealed), shall be in full force and effect, and shall be as good, valid, and effectual to all intents and purposes whatsoever for carrying this Act into execution as if the same had been repeated and re-enacted in the body of this Act."

Statement.

The case came on for hearing before Vice-Chancellor *Hall* on the 24th of April, 1877.

Dickinson, Q.C., and *Whiteford*, in support of the summons to vary the certificate, referred to *Attorney-General* v. *Corporation of Exeter* (1); *Widmore* v. *Woodroffe* (2); *Middleton* v. *Clitherow* (3); *Trustees of British Museum* v. *White* (4); *Mogg* v. *Hodges* (5).

Argument.

Hemming, Q.C, and *Dryden*, for the guardians, referred to *London and Blackwall Railway Company* v. *Limehouse District Board of Works* (6); *Thorpe* v. *Adams* (7); *Taylor* v. *Corporation of Oldham* (8); *Perring* v. *Trail* (9).

Hastings, Q.C., and *Chubb*, for the Plaintiff.

Eddis, Q.C., and *Webb*, for the Defendants.

Rigby, for the Attorney-General.

(1) 2 Russ. 45; 3 Russ. 395.
(2) Amb. 636.
(3) 3 Ves. 734.
(4) 2 S. & S. 594.
(5) 2 Ves. Sen. 52.
(6) 3 K. & J. 123.
(7) Law Rep. 6 C. P. 125.
(8) 4 Ch. D. 395.
(9) Law Rep. 18 Eq. 88.

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C. A. 1877 LUCKRAFT v. PRIDHAM. Judgment, V.-C. H.

HALL, V.C.:—

I am of opinion that the guardians are unable to take the benefit of this gift. The question depends upon whether the statute 9 Geo. 2, c. 36, ought or ought not to be restricted in its construction to cases in which there has not been provision made in some previous Act of Parliament for testators bequeathing or devising property for the benefit of some specific charities. It appears to me that the 9 Geo. 2, c. 36, is a general law which was meant to apply to all His Majesty's subjects in reference to making dispositions in favour of charities such as are there described. The law was meant to be applicable to everybody, whether they selected one charity or another; it was intended to prevent testamentary gifts of property savouring of land for charitable purposes without any exception in favour of charities having particular powers under any charter or any particular Act of Parliament passed long before, when a different policy was guiding the Legislature with reference to charitable gifts.

That being my view, the case seems to me to be entirely without the scope of the general reasoning and argument which has been addressed to me upon the construction of statutes, that where there is a statute giving particular powers to a particular body, the general words of a subsequent statute are to be construed as not taking away the special powers given before. Thus, when you have a particular statute applicable to merchants, or a particular class, and then a general law which would embrace those persons taken as part of the public generally, there being a specific law as to those particular persons, subsequent legislation expressed in general terms is not to be applied to them unless from the nature of the subsequent legislation it can be seen that they fairly come within its object and purpose. As I said before, all His Majesty's subjects came under the provisions of the statute of Geo. 2, in reference to the protection given to them against their improvident and improper dispositions of their property.

That being so, it seems to me the case is clearly within the 9 Geo. 2, c. 36. But it is said that the case is varied by reason of the provisions of the subsequent Acts relating to this corporation. I do not at all take that view of the effect of those Acts. [His Lordship here stated the provisions of the Act 32 Geo. 2, as

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above.] That is to say, those former powers and articles and things are to be "executed with respect to the matters herein contained," there being no "matter herein contained" which in any way enables testators to give anything which they could not by law otherwise give. This is merely applying the working machinery and provisions of the former Act to the new provisions of the new machinery created by the second Act. It does not re-enact the clause so as to bring it down to that date.

Then the next Act of Parliament to which I will refer is the Act of 53 Geo. 3, c. 73. The title of this Act, as is the case with the titles of the other Acts, does not point to doing any such thing as is contended for. [His Lordship then stated the provisions of this Act in nearly the same terms as above.] That comes in substance to no more than this, that the old Act and its provisions "shall be of full force and effect, and shall be as good, valid, and effectual to all intents and purposes whatsoever for carrying this Act into execution as if the same had been repeated." So that it merely keeps the old provisions on foot for the purpose of carrying into effect the new Act of Parliament. Now with regard to the intervening Act, which I have not read, it is not necessary to go through it, because it is substantially the same as the Act of Geo. 2, that is to say, it provides that the new Act and the powers in the old Act are to be executed with respect to the matters therein contained as if the clauses were, with the alterations therein, contained re-enacted with respect to that Act. It appears to me that these provisions do not at all support the contention sought to be founded upon them, and that it was never intended by a side-wind to alter the general law, so as to enable all testators to give whatever they thought proper to this charity. In addition to that, it appears to me that *Widmore* v. *Woodroffe* (1) and *Middleton* v. *Clitherow* (2), and the cases there referred to, are authorities specially applicable to this case. It seems to have been taken for granted, and decided over and over again, with regard to *Queen Anne's Bounty*, that their power of taking land under their first Act of Parliament had become inoperative by reason of 9 Geo. 2, c. 36, and therefore they got a new Act of Parliament to enable them to take and hold property in the manner

(1) Amb. 636. (2) 3 Ves. 734.

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specified in the new Act. The consequence is that the fund arising from real estate must be distributed on the footing of the invalidity of the charitable gift.

C. A.

The guardians appealed. The appeal was heard on the 4th and 18th of July.

Argument.

Hemming, Q.C., and *Dryden*, for the Appellants:—

The statute 6 Anne enables the guardians to take by devise, and enables persons to devise to them.

[JESSEL, M.R.:—That only puts the corporation in the same position as if a license in mortmain had been obtained.

JAMES, L.J.:—It takes away the objection arising from their being a corporation.]

Where there is a special Act, a general Act containing words wide enough to repeal it will not be construed as having that effect unless there are words referring to the special Act: *Taylor* v. *Corporation of Oldham* (1), *Thorpe* v. *Adams* (2); *London and Blackwall Railway Company* v. *Limehouse District Board of Works* (3). Then each of the later Acts concerning this charity provides that the Act of *Queen Anne* shall have the same effect as if it was embodied in that Act. Now, if the enabling clause of the statute of *Anne* had been repeated, it is difficult to see how the conclusion could have been avoided that this charity was taken out of 9 Geo. 2, c. 36.

[JAMES, L.J.:—Have you any case where anything was held to be taken out of the statute 9 Geo. 2, c. 36, by an Act not referring to that statute?]

If a statute expressly gives power to devise to a charity, it would be mere verbiage to add, "notwithstanding 9 Geo. 2, c. 36." In cases somewhat similar to the present, where the decision has been adverse to the charity, the Act relied on did not take away the disability of testators to devise to a charity, as in *Robinson* v. *Governors of London Hospital* (4). The case of *Perring* v.

(1) 4 Ch. D. 395.
(2) Law Rep. 6 C. P. 125.
(3) 3 K. & J. 123.
(4) 10 Hare, 19.

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Trail (1) is very like the present, and the 9 Geo. 2, c. 36, was not referred to.

[JAMES, L.J.:—In the Act in that case there are words evidently pointing to 9 Geo. 2, c. 36. The particular kind of property, a bequest of which is made illegal by that statute only, is expressly referred to.]

In *Trustees of British Museum* v. *White* (2), the statute 5 Geo. 4, c. 39, which conferred on the *British Museum* the right to take land by devise does not appear to have been referred to, so the case is no authority against us.

[JESSEL, M.R.:—Does not the statute 9 Geo. 2, c. 36, repeal the power given by the *Statute of Wills* so far as regards charities? Suppose the statute had said that lands should not be given by will at all, do you say that the guardians could then have taken?]

No; that would not have been an enactment in *pari materiâ*, but one taking away all testamentary power; here we are dealing with Acts in *pari materiâ*.

Dickinson, Q.C., and *Whiteford*, *contrà*, were not called upon.

JESSEL, M.R.:—

An Act passed in the reign of Queen *Anne*, before the date of the *Charitable Uses Act*, enabled a charitable corporation to take and hold land without requiring a license in mortmain. The words used for the purpose were proper legal words, which authorized donors or testators to give or devise, and authorized the charitable corporation to accept and hold. That the intention was merely to dispense with the license in mortmain is clear, for at that time there was no legal prohibition which prevented intending donors devising land by will to charitable uses.

Then there comes a general Act, 9 Geo. 2, c. 36, the object of which is to protect heirs from being disinherited, or, to use the words of the Act, "This public mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their death to the disheri-

(1) Law Rep. 18 Eq. 88. (2) 2 S. & S. 594.

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son of their lawful heirs, for remedy whereof be it enacted"—so that the Act is for the benefit of the lawful heirs, and what it enacted in substance is this—that lands shall not be given to charitable uses except by deed properly executed and attested twelve months before the death of the donor, and inrolled. In other words, it absolutely destroys the power until that time possessed by men in *England*, of devising land by will to charitable purposes. Why this should not apply to a gift to this charitable corporation as well as to any other charity, I am at a loss to conceive. The statute 9 Geo. 2, c. 36, is strictly not at all in *pari materiâ* with the Mortmain Acts, though no doubt it went on the same line of policy; it deprives men of the power of devising to charities, which power it had been found in practice was abused. It seems to me that up to this point the case is quite unarguable, the license in mortmain having nothing to do with the provisions of the 9 Geo. 2, c. 36. Then there come some later private Acts which continued the old provisions of the statute of *Anne* and made them applicable to the purposes of those Acts. Continuing the provisions did not alter their nature and effect. They meant just the same when they were continued as they meant before, and even if they had been re-enacted in so many words, that could not have altered their effect, which was only to dispense with the necessity for a license in mortmain.

That being so, there is, as it appears to me, no pretence for saying that the Legislature has repealed in favour of this corporation that portion of the *Charitable Uses Act* which prohibited persons from devising land to a charity; that the testator in this case had no power of testamentary disposition *quoad* these lands in favour of charity; and that being so, the attempted devise is null and void, and must fail, as the Vice-Chancellor has held.

James, L.J.

JAMES, L.J.:—

It appears to me the Vice-Chancellor's decision was incontrovertibly right.

BAGGALLAY and COTTON, L.JJ., concurred.

Solicitors: *Hare & Fell; Deane, Chubb, & Co.*

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Ex parte HOSFORD. *In re* SMITH.

C. A. 1877 July 19.

Debtor's Summons—Staying Proceedings—Security—Discretion of Judge—Pending Action for same Debt with specially indorsed Writ—Bankruptcy Act, 1869, *s.* 7—*Rules of Court*, 1875, *Order* XIV., *rr.* 1, 6.

When an order is made staying the proceedings on a debtor's summons, the fact that in a pending action by the summoning creditor for the same debt, with a specially indorsed writ, the Plaintiff has not attempted, under Rules of Court, 1875, Order XIV., rules 1, 6, to obtain security for the debt, is not a conclusive reason for staying the proceedings on the summons without security.

Ex parte Latham (1) distinguished.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, sitting as Chief Judge in Bankruptcy.

On the 26th of February, 1877, *William Hosford* commenced an action in the Queen's Bench Division against *E. T. Smith*. The writ was specially indorsed that the Plaintiff's claim was for money lent by the Plaintiff to the Defendant, and also for money lent by one *W. L. Thompson* to the Defendant, and subsequently assigned by *Thompson* to the Plaintiff, and for interest thereon, and also for principal and interest payable by the Defendant to the Plaintiff, by virtue of a mortgage dated the 1st of November, 1872, and made between the Defendant of the one part and *Thompson* of the other part, and of an assignment thereof dated the 22nd of February, 1877, and made between *Thompson* of the one part and the Plaintiff of the other part. Particulars of the claim were given, which shewed that the amount due to the Plaintiff was £4679 19*s.* 8*d.* The Defendant appeared to the writ. No statement of claim was delivered. No application was made to the Court under Rules of Court, 1875, Order XIV., rule 1, calling on the Defendant to shew cause why the Plaintiff should not be at liberty to sign final judgment for the amount indorsed on the writ, in which case, if leave had been given to defend the action, the Defendant might, if the Judge had thought fit, have been required, under rule 6, to give security for the sum claimed.

On the 8th of May, *Hosford* issued a debtor's summons against

(1) 4 Ch. D. 105.

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C. A. 1877 *Ex parte* HOSFORD. *In re* SMITH.

Statement.

Smith for the same debt. *Smith* applied to the Court of Bankruptcy to dismiss the summons, and made the ordinary affidavit that he was not indebted to *Hosford* in the aggregate amount of the sum claimed. On the 15th of May, *Smith* delivered a statement of defence and set-off and counter-claim in the action, by which he alleged that *Hosford* was indebted to him in an amount far exceeding the amount indorsed on the writ. On the 12th of June, the application to dismiss the summons was heard by the Registrar, who was of opinion that he ought not to require *Smith* to give security for the alleged debt, because the action had been commenced before the summons was issued, and the Plaintiff had not availed himself of the opportunity of obtaining security in the action under the provisions of rule 6 of Order XIV. His Honour accordingly stayed the proceedings on the summons, pending the trial of the action, but without security.

Hosford appealed.

Argument.

Winslow, Q.C., and *E. C. Willis*, for the Appellant:—

Security ought to have been required. The mere fact that an action has been commenced before issuing the summons is not a bar to requiring security. Form No. 9 of the Bankruptcy Forms, 1870, clearly contemplates the continuance of an action commenced before the summons was issued: *Ex parte Ruck* (1); *Ex parte Turner* (2). At any rate the Registrar ought to have gone into the merits of the case, and should especially have considered the question of the debtor's solvency: *Ex parte Marshall* (3).

De Gex, Q.C., and *Hume Williams*, for *Smith*:—

The Appellant had an opportunity of obtaining security in the action. He did not choose to avail himself of it, and why should he be allowed to make use of the Court of Bankruptcy for that purpose? *Ex parte Latham* (4) shews that he cannot be allowed to do this.

[BAGGALLAY, L.J.:—In *Ex parte Latham* security had been asked for in the action, and had been refused.]

(1) 8 L. T. (N.S.) 102.
(2) Law Rep. 10 Ch. 175.
(3) 5 Ch. D. 873.
(4) 4 Ch. D. 105.

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If the Plaintiff does not ask for security in the action because he knows that he is not likely to get it, it is in substance the same thing as if he had asked and had been refused. In the present case the defence to the action is that nothing is really due, and that being so, it is not to be wondered at that the Plaintiff did not ask for security. The debtor is ready to swear to the truth of his defence to the action.

[COTTON, L.J.:—In his affidavit upon the application to dismiss the summons, he has only sworn that the sum claimed is not due.]

That is in accordance with Form No. 8 of the Bankruptcy Forms, 1870. The debtor cannot be prejudiced by that: *Ex parte Rowan* (1).

E. C. Willis, in reply:—

The effect of the decision is that in every case where, before the debtor's summons has been issued, an action has been commenced for the debt with a specially indorsed writ, and no application for security has been made in the action, the creditor cannot avail himself of the procedure by debtor's summons. The *Bankruptcy Act* is not repealed by the *Judicature Act*, and in the Court of Bankruptcy regard is always had to the solvency of the debtor, as well as to the probability of his success in the action: *Ex parte Marshall* (2).

JAMES, L.J.:—

On the whole, I think that the Registrar's order must be discharged, and that the matter must go back to him for further consideration. He has acted upon a principle which amounts to this, that the mere fact that the creditor has already commenced an action for the debt with a specially indorsed writ, and that he has not made in the action an application by which he might have obtained security for the sum claimed on the writ, operates as an estoppel to his obtaining security upon the staying of proceedings on the debtor's summons. The Registrar declined to go into the

(1) Law Rep. 9 Ch. 617. (2) 5 Ch. D. 873.

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C. A. 1877 *Ex parte* HOSFORD. *In re* SMITH. Judgment, James, L.J.

merits of the case, but said, "As you have neglected to take that step in the action, I will not exercise my discretion in requiring the debtor to give security." I am of opinion that in so doing the Registrar proceeded upon a wrong principle. I think that the matter must go back to him for consideration upon the merits, and that he ought to take into consideration the statement of defence in the action, which must, however, be verified upon oath. If he is satisfied that the defence is a genuine one, and that there is a probability of the Defendant succeeding, he will exercise his discretion accordingly. The conduct of the Plaintiff in not availing himself of the opportunity which he had in the action of obtaining security for the debt will also be a material circumstance to be taken into consideration by the Registrar. But he ought to have exercised his discretion upon all the facts before him, and not to have proceeded upon the mere fact that no attempt was made to obtain security in the action. The costs of the appeal will be costs of the summons, and will be dealt with by the Registrar.

BAGGALLAY and COTTON, L.JJ., concurred.

Solicitors for Appellant: *S. M. & J. B. Benson.*
Solicitor for Debtor: *W. R. Philp.*

C. A. 1877 July 25.

DAWSON *v.* BANK OF WHITEHAVEN.

[1875 D. 133.]

Dower—Mortgage by Husband and Wife of Husband's Freehold Estate—Wife's Right to redeem—Principal and Surety.

A wife, married before the *Dower Act*, joined, for the purpose of releasing her dower, with her husband in mortgaging his freehold estate to secure his debt. By the mortgage deed the equity of redemption was reserved to the husband:—

Held, that the wife's right to dower was extinguished in equity as well as at law, and that she had no right to redeem the estate:

Held, also, that, as she had pledged no estate recognised by a Court of Equity, and had undertaken no personal liability on behalf of her husband, she had no right in the character of a surety for his debt to have the value of her dower made good after his death out of the surplus proceeds of sale

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of the property which had been during his life sold by the mortgagee under a power of sale contained in the mortgage deed.

Decision of *Bacon*, V.C., reversed.

Jackson v. *Parker* (1) and *Jackson* v. *Innes* (2) discussed and explained.

C. A. 1877

DAWSON v. BANK OF WHITEHAVEN.

THIS was an appeal from a decision of Vice-Chancellor *Bacon*, which is reported (3).

Statement.

The following is a brief summary of the facts:—

In December, 1846, *John Dawson* and his wife, to whom he had been married in January, 1831, joined in executing a mortgage of a freehold estate of which he was seised in fee to *Thomas Brocklebank* and others, freed from the wife's right to dower. The equity of redemption was limited to the husband, his heirs or assigns. The deed contained a power of sale and a provision that the surplus proceeds of sale should be paid to the husband, his heirs, executors, or assigns.

In November, 1854, the husband alone executed a second mortgage of the property to the *Bank of Whitehaven*. The mortgage deed recited the mortgage deed of December, 1846, and the estate was expressed to be conveyed free from the wife's dower, but subject to the mortgage of December, 1846. The equity of redemption was limited to the husband, his heirs and assigns, and there was a power of sale and a declaration that the surplus proceeds of sale should be paid to the husband, his heirs, executors, administrators, or assigns. In December, 1858, the bank paid off the first mortgagees, and took a transfer of their mortgage. In October, 1860, the bank sold the property. The proceeds of sale were insufficient to discharge both the mortgage debts. In November, 1874, the husband died. In October, 1875, the widow filed the bill in this suit, claiming thereby to have the value of her dower made good to her out of the surplus of the proceeds of the sale of the estate, after payment of what was due in respect of the first mortgage. The Vice-Chancellor decided in favour of this claim. The bank appealed.

Argument.

Sir *H. Jackson*, Q.C., and *A. Brown*, for the Appellants:—

The only authorities in favour of the Vice-Chancellor's decision

(1) Amb. 687.

(2) 1 Bli. 104.

(3) 4 Ch. D. 639, where the facts are fully stated.

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C. A. 1877 DAWSON v. BANK OF WHITEHAVEN. Argument.

are observations of Sir *Thomas Sewell* in *Jackson* v. *Parker* (1) and of Lord *Redesdale* in *Jackson* v. *Innes* (2). But those observations were only extrajudicial, and when carefully examined they do not support the general proposition that a wife who has extinguished her dower at law can have a right in equity to redeem in respect of it. The observations depended really on the particular circumstances, and did not lay down any general principle. And so they are treated in *Jarman's Bythewood* (3), where opinions to the same effect of Mr. *Hayes* and Mr. *Bell* are cited with approval. Dower is only incident to a legal estate, it is not recognised by a Court of Equity as attaching to a mere equitable estate. The Plaintiff can have no right in the character of a surety for her husband's debt, for, her dower being extinguished, she did not mortgage any estate of hers for his benefit. Moreover, in this case the property was sold by the mortgagee in his lifetime, and the result is the same as if it had been sold out and out in the first instance. There can be no dower out of money.

Kay, Q.C., and *Dryden*, for the Plaintiff:—

The weight of authority is in favour of the proposition that a wife joining in mortgaging her husband's freehold estate for the purpose of barring her dower at law, bars it in equity only to the extent necessary to satisfy the mortgage debt, and that in equity she has a lien for her dower on any money arising from the sale of the land, after satisfaction of the mortgage: *Jackson* v. *Parker*; *Jackson* v. *Innes*; *Anon.* (4); *Dolin* v. *Coltman* (5); *Wood* v. *Wood* (6). At any rate, the wife, as a surety for the husband's debt, is entitled to stand in the mortgagee's place as against the surplus. This right would be clear as against the husband, and is equally clear as against a purchaser with notice. The principle of *Robinson* v. *Gee* (7) and *Partericke* v. *Powlet* (8) applies. *Banks* v. *Sutton* (9) is also in favour of the right to dower.

[JESSEL, M.R.:—That case was decided before it had been

(1) Amb. 687.
(2) 1 Bli. 104.
(3) 2nd Ed. vol. iv. pp. 173-176.
(4) 2 Eq. Cas. Ab. 385.
(5) 1 Vern. 294.
(6) 7 Beav. 183.
(7) 1 Ves. Sen. 251.
(8) 2 Atk. 383.
(9) 2 P. Wms. 700.

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settled that a widow was not dowable out of an equity of redemption.]

Moreover, the trust of the surplus proceeds of sale is declared by the wife as well as the husband. She has therefore an interest in the proceeds of sale in respect of her dower.

Judgment, Jessel, M.R.

JESSEL, M.R.:—

This is an appeal from a decision of Vice-Chancellor *Bacon*, giving relief to the widow of a testator in respect of her alleged right of dower in a freehold estate of which he was seised during the coverture, which began before the passing of the *Dower Act*. The case, therefore, is governed by the old law.

The real question in controversy between the parties is a very simple one, viz., whether, under the old law, when a wife joined with her husband in levying a fine of his freehold estate, and they mortgaged the estate in fee, her right to dower, which was destroyed at law, subsisted in equity for any purpose, and whether she had any right against her husband's estate in the character of a surety for his debt in respect of that inchoate right of dower which she had destroyed at law.

Now, there is not much authority upon the point, but the most remarkable thing is that no such bill as that in the present suit can, so far as I am aware, be found, or is alleged to have ever been heard of by any human being. That is a remarkable fact, if the law is as it is alleged to be on the part of the Plaintiff. It is not conclusive, but it is remarkable.

With regard to the law itself, I think it may be stated in a very few words, as I understand it. For some reason or other, equity did not follow the law as regards dower. There was no dower out of an equitable estate. In all other cases there was a similar estate in equity to that which there was at law, but that rule did not apply to dower. We must recollect that, in discussing the question which we have to consider. That being so, the husband and wife's fine destroyed her dower by changing the seisin, because the use of the fine was to the mortgagee in fee, and consequently the dower was absolutely gone at law. Where is the equity in the widow to set it up again? She voluntarily destroyed the dower at law. She voluntarily changed her husband's estate from a legal

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C. A. 1877 DAWSON v. BANK OF WHITEHAVEN. Judgment, Jessel, M.R.

estate to an equitable estate, namely, the equity of redemption. She knew, or must be taken to have known, that one of the incidents to a legal estate, the inchoate right to dower, did not attach to an equitable estate. Consequently, by changing the character of the estate, she lost the benefit of that which was an incident to the legal estate. Why she should be entitled in equity to recover it I do not understand, when we recollect there was no right to dower out of an equitable estate. Such a title could not be founded on contract, for there was no contract.

That being so, it seems to me that, unless there is some authority to the contrary, we must hold that, as the Plaintiff had extinguished her dower at law, that extinguishment operated as an extinguishment in equity also, because dower did not exist in equity at all. If that be so, there is nothing further to argue. But of course we are not at liberty to lay down new law upon questions of real property, and it is necessary therefore to refer to some of the authorities which have been cited as establishing this right claimed by the widow, and which the Vice-Chancellor thought was established.

Now, there really are but two authorities which it appears to me to be necessary to consider. The first is the case of *Jackson* v. *Parker* (1). The substance of that case was this: The husband was tenant in tail. He and his wife levied a fine, and then conveyed the estate away by way of mortgage. The proviso for redemption reserved the right to redeem to the husband and wife, their heirs or assigns. There was a subsequent declaration that the uses of the fine should be (subject to the payment of the mortgage debt) to the husband, his heirs and assigns. The real point was, whether his seisin had ceased to be a sole seisin in equity so as to prevent his devising the estate; and Sir *Thomas Sewell* decided that his seisin was still a sole seisin, notwithstanding that the proviso for redemption apparently made him tenant by entireties with his wife. In other words, looking at the whole deed, he came to the conclusion that no re-settlement was intended. That was all the decision. But, in coming to that conclusion, Sir *Thomas Sewell* made some observations which have been supposed to shew that he was of opinion that, independently of the peculiar

(1) Amb. 687.

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terms of the deed, the wife would have had a right to redeem in respect of her dower. He says (1): "It is material to consider the intention of the parties to the deed of 1732" (that is, the mortgage deed). "It is a mere equitable matter. The wife had no interest but a mere possibility of dower, the husband had the whole interest in the estate. It has been supposed that there was a contract between the husband and wife, by which she gave up her right of dower, and was to have the chance of the whole equity of redemption in case she survived her husband. This, in my opinion, is a very unnatural supposition. If it had been so, it would have been recited in the deed. Her right of dower accounts for her joining in the fine. The deed is planned as between a mortgagor and mortgagee. The wife had a right to redeem, and, if she had redeemed, a Court of Equity would not have taken the estate from her but upon the terms of allowing her dower." Now, the first observation appears to me not to mean that the wife would have a right to redeem independently of the form of the deed, but that the form of the deed gave her the right to redeem, the reservation of the right to redemption giving her an estate as tenant by entireties with her husband, and if she survived she could have redeemed under that proviso, and then, having redeemed, the Court would not take the estate from her, except upon the terms of giving her her dower. I am quite aware that some of the text writers have taken a different view; but one, at all events, takes the view which I have expressed, for in Mr. *Fisher's* book on Mortgages he says (2): "Where the estate mortgaged was the husband's, and the wife joined to bar dower, and the equity of redemption was limited both in the first and in subsequent securities to the husband and wife and their heirs, and the mortgage contained a declaration that, after payment of the debt, the fine levied should enure to the husband and his heirs, the proviso for redemption was held not to operate against the husband's ownership, beyond the wife's right to redeem in respect of her dower." That is his view of *Jackson* v. *Parker* (3). Other writers take a different view, but it shews that my view of it is not a novel one.

(1) Amb. 691. (2) 3rd Ed. p. 752.
(3) Amb. 687.

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Then it is said that at all events Lord *Redesdale*, in the well-known case of *Jackson* v. *Innes* (1), came to the same conclusion in terms which are free from ambiguity. On looking at what he says, I do not think he did. In the first place, Lord *Redesdale* (2) discusses the case of *Lewis* v. *Nangle* (3), and he then comes to *Jackson* v. *Parker* (4). I will not read what he says, except from p. 124. He mentions the facts most carefully, including the form of the proviso for redemption, and then he says, "Upon a contest for redemption the Court would regard the ownership of the estate previous to the mortgage, and in that view the husband would be considered as the person entitled to redeem, the wife being entitled to redeem only in respect of her interest, which would have been only a right to dower if she had survived her husband. In such case she would have been entitled to have had the estate redeemed for the purpose of letting in her dower, but there her right ended, and that therefore the husband must be taken to be, in equity, sole seised of the estate, as if the mortgage had not been made." In other words, as I understand the statement, it is this, that she would have a right, under the peculiar reservation to her as survivor, to redeem, and, having redeemed and got the legal estate in her, to keep it till her dower was satisfied. Then he goes on to say (5): "It must now be admitted as an established principle, to be applied in deciding upon the effect of mortgages of this description, whether it be the estate of the wife or the estate of the husband, if the wife joins in the conveyance, either because the estate belongs to her, or because she has a charge by way of jointure or dower out of the estate, and there is a mere reservation in the proviso for redemption of the mortgage which would carry the estate from the person who was owner at the time of executing the mortgage, or where the words admit of any ambiguity, that there is a resulting trust for the benefit of the wife, or for the benefit of the husband, according to the circumstances of the case." Now it appears to me that those words do not shew that the wife has a right to redeem, unless there is something in the proviso for redemption which would carry the estate from the

(1) 1 Bli. 104.
(2) Ibid. 122.
(3) Amb. 150.
(4) Ibid. 687.
(5) 1 Bli. 126.

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person who was owner at the time of executing the mortgage, or some ambiguity in the proviso, and more especially when it is considered that he is not stating new law. He says, "It must now be admitted as an established principle," that is, by the cases which he has mentioned before. First of all, having cited a case where the estate belonged to the wife, then a case of dower, he is stating only the result of those cases, and the result as regards dower was this, that, when the right to redeem was reserved to the wife, she could exercise it, at all events, to the extent of regaining that right to dower which she had lost by the operation of the fine. When they are carefully considered, I think neither of these *dicta* militate against the general principle. But we must consider also the effect of the text-books. In these matters of real property law we must not forget that even an erroneous interpretation of a case, if it has been long acquiesced in by the profession, is not to be lightly disturbed. On looking, however, at the text-books, I find that different views have been entertained down to the most modern times. Several text-writers of great eminence,—*Jacob*, in his edition of *Roper* on Husband and Wife, *Coote* on Mortgages, and *Coventry*, in his edition of *Powell* on Mortgages,—take the view that the wife has the right to redeem in respect of her dower. On the other hand, in *Jarman's Bythewood* (1), that proposition is said to be clearly erroneous, and he states his own view the other way. He not only states his own view but also the view of two other gentlemen of great eminence, Mr. *Bell* and Mr. *Hayes*. Their opinion also is the other way, and although he states that there is the opinion of another gentleman of eminence to the same effect as that of the text-books to which I have referred, he thinks it a mercy to him to suppress his name, because his view is a manifest error. That is a statement in a comparatively modern text-book. The last two text-books on the subject again differ. There is the edition of *Davidson's* Conveyancing by Messrs. *Wright* and *Waley*, which states it one way, though certainly with a suggestion of a doubt, and there is the well-known book of Mr. *Fisher* on Mortgages, which states it the other way. So that it cannot be considered that the profession has always taken the same view even of those *dicta* of Sir *Thomas Sewell* and Lord *Redes-*

(1) 2nd Ed. vol. iv. pp. 173–175.

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C. A. 1877

DAWSON v. BANK OF WHITEHAVEN.

Judgment, Jessel, M.R.

dale, and there is really nothing in the authorities or the text-books to prevent us from deciding upon the plain principle that the legal right to dower was extinguished, and that the right to dower, not being an incident to an equitable estate, cannot afterwards exist for any purpose which can be recognised in this Court. Therefore upon this ground I am of opinion that the decision of the learned Vice-Chancellor cannot be maintained.

I have not forgotten the two other arguments used on behalf of the Plaintiff. One was that, even if the right to dower was extinguished, she would still have the ordinary right of a surety. That argument I am not able to follow. If the right to dower is extinguished, she had no property to pledge as to which the question of suretyship could arise, nor did she become personally liable for the mortgage debt so as to raise any question of personal suretyship.

The other point taken was that the property was actually sold under the power of sale in the husband's lifetime, and thereby converted into money, and that that power had been granted by the wife by her being a party to the first mortgage deed. I think it would be exceedingly difficult after the sale, the sale moneys being directed to be paid to the husband, and the wife having consented to the property being converted into personalty in his lifetime, to say that she could be in a better position than if she had consented to a sale in the first instance instead of a mortgage. But, upon the other grounds which I have mentioned, I am of opinion that the appeal must be allowed, and the bill dismissed.

James, L.J.

JAMES, L.J.:—

I am of the same opinion, and I am bound to say if I had been asked when I was at the Bar to give my opinion whether any such right of redemption existed, I should have answered at once in the negative, possibly not recollecting all that had been said in the text-books as to the two cases which have been referred to. When, however, those two cases were referred to, my impression was that they contained *dicta* which indicated the existence of such a right in the wife to redeem by reason of her dower. It only shews how necessary it is carefully to consider the language of learned Judges, especially when you are dealing with language

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which is admitted to be only a *dictum* and not a decision, and when it is attempted to use that language for the purpose of founding on it an article of a code of law. When, however, this language comes to be carefully examined, having regard to the facts of *Jackson* v. *Parker* (1), and to the way in which Lord *Redesdale* refers to it, I say, when you examine the language carefully, you really find that that which upon casual reading would appear to be the statement of the law is not what the Judges meant or said; that all that they said is applicable only to the particular form of instrument then before them, and that neither of those learned Judges meant to say that there was, or that there was supposed to exist in the Court of Chancery, a right in a wife to redeem because she had joined with her husband in levying a fine of the real estate of her husband to enable him to mortgage it free from her dower, a right which, if it had existed, must have been the subject of innumerable suits during the hundreds of years in which such conveyances have been made, and by means of which most valuable estates would have been recovered by married women. No such case has been found, or suggested as to be found, and I think it was not intended by Sir *Thomas Sewell* or by Lord *Redesdale* to intimate an opinion that that which had never been actually done was the law of the Court. It appears to me, therefore, that there was really no foundation for that which has found its way into some of the text-books, and upon which the Vice-Chancellor's decree in this case apparently proceeded. I agree with the Master of Rolls, that if there had been a long series of text-books dealing with this particular point of real property law as having been settled in one way, it would be much better to follow them than to disturb an universally accepted notion or principle upon which many people might have acted, and upon which many estates might depend. But there really seems on this point to be as weighty authority on the one side as on the other. There is this also to be observed, that no one can have accepted a title upon the faith of the notion which now appears to have been erroneously entertained. If anything has ever been done based upon what has been said by the text-writers, it can only be that extra precautions have been taken by second

(1) Amb. 687.

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C. A. 1877 DAWSON v. BANK OF WHITEHAVEN.

mortgagees or purchasers in getting the wife to join in a fresh conveyance to confirm the title. No harm can be done by our deciding that such precautions were unnecessary, and there could be nothing in the current of authorities, if there had been a current of authorities, to induce us to say that a rule was laid down by those two cases, which upon examination we find was not laid down, and which is clearly inconsistent with that which has been for a very long time the settled law of this Court, that it does not recognise any equitable right to dower. That being so, the main foundation of the case has failed.

Judgment, James, L.J.

With regard to the view suggested that the case should be dealt with as one of suretyship, that is to say, that the wife is supposed to give up her property or right to property to enable her husband to make a mortgage, it seems to me that there is no place for that argument unless as a matter of fact there is property of the wife recognised in the Court of Chancery which she parts with. When once she has joined in extinguishing her right to dower, and in converting, or enabling the husband to convert, his legal estate into an equitable one, she has done it for all purposes. The dower which was an incident of the legal estate fell with it, and no incident could be raised in respect of the equitable estate different from that which a Court of Equity always attached to equitable estates. The Plaintiff's case therefore wholly fails. The fact that the property has been sold and converted into money shews how impossible it is to apply the contention of the Respondent. If the husband and wife joined in converting the estate into money, neither in the first instance, or through the medium of a mortgage with a power of sale, it seems to me impossible to hold that the wife so joining and converting the land into money could have any right against the husband's estate to be repaid out of it the value of her dower.

Cotton, L.J.

COTTON, L.J. :—

I am of the same opinion. No doubt it is true as a general proposition that where a wife mortgages her property for her husband's debt she is considered as parting with it solely for the purposes of the mortgage. But in such cases you are dealing with property which a Court of Equity recognises, and which it assists a

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married woman in securing even though a mere equity. In the present case we are dealing with something quite different. The Plaintiff says, I am entitled to my dower notwithstanding that I joined in the mortgage for the purpose of releasing it, and notwithstanding that there was a power in the mortgage to sell the estate and convert it into money. It has been converted into money, and she now comes and says, "I am entitled, on the general principle which has been referred to, to have the value of my dower out of that money." How can she do this? By the release the dower is gone at law, and a Court of Equity does not recognise the right of dower in the sense of giving it out of estates which are merely equitable. That, in my opinion, is conclusive against the present suit.

As regards the authorities which have been quoted, it is perfectly clear that Sir *Thomas Sewell*, in *Jackson* v. *Parker* (1), was simply saying that, notwithstanding the proviso for redemption professed to give to the wife a right larger than her right to dower, it did not alter the rights of the parties. If the wife redeemed, she would only get a right in the estate such as she had before, viz., a right to dower, and the Court of Equity would not take the estate (though it was her husband's originally) from her, except on the terms of allowing her her dower out of it. With reference to the case before Lord *Redesdale*, I think he was merely dealing with the particular form of the proviso for redemption in that case, and he says that if, when a wife joins for the purpose of releasing her dower in a mortgage of her husband's estate, the limitation of the equity of redemption gives it in form to some one who was not owner at the time of executing the mortgage, that will not change the property. At the time of executing the mortgage in the case supposed the husband was the owner, and I think Lord *Redesdale* must mean this, that if the limitation is, as in *Jackson* v. *Parker*, to the wife, it will not alter the property; she may redeem, but she may redeem only for the purpose of securing to herself that which, but for the form of the limitation, she could not have got—viz., her dower. That explains what is said by Lord *Redesdale* in that case. It was in reference to the particular form of limitation in *Jackson* v. *Parker*, and he explains it by

(1) Amb. 687.

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C. A. 1877 DAWSON v. BANK OF WHITEHAVEN.

saying that the form of the reservation of the equity of redemption does not change the right. The right of the wife, to whom the equity of the redemption is reserved by the deed, was a right to dower only, and she was entitled to redeem under that limitation and not independently of it.

Judgment, Cotton, L.J.

The only other case to which I need refer is *Dolin* v. *Coltman* (1). That is very shortly reported, and I think probably it is the same in principle. It may have been that in the mortgage deed there, the equity of redemption was reserved to the wife, and the Court may have considered that setting that up as an alteration in the property of the estate so as to defeat the subsequent mortgagees was a fraud, and what the Court gave the wife in that case was a right to insist on the reservation to her of the equity of redemption, not for the purpose of making the estate her own, but only for the purpose of securing her right to dower, which otherwise she would have lost.

Solicitors: *Gregory, Rowcliffes, & Rawle*, agents for *Atkinson, Collins, & Atkinson, Whitehaven; Johnston & Harrison*, agents for *Postlethwaite & Brown, Whitehaven.*

C. A. 1877 *July* 26.

Ex parte SCHOFIELD. *In re* FIRTH.

Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 96—*Protection of Witness—Answers tending to criminate.*

A mere witness summoned for examination, under sect. 96 of the *Bankruptcy Act*, 1869, as to the property of a bankrupt, is entitled to refuse to answer a question on the ground that his answer would tend to criminate himself.

The bankrupt himself, however, being under a personal obligation to make a full disclosure of his property to his creditors, is not entitled to any such protection, but must answer all questions put to him about his property, whatever the consequences to himself may be.

Statement.

ON the 14th of March, 1877, *James Firth*, a woollen cloth manufacturer at *Halifax*, filed a liquidation petition in the *Halifax* County Court, and on the 5th of April his creditors resolved upon

(1) 1 Vern. 294.

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C. A. 1877 *Ex parte* SCHOFIELD. *In re* FIRTH. Statement.

a liquidation by arrangement, and appointed *William Schofield* and *Alfred Good* trustees of the debtor's property. The proceedings were afterwards transferred to the *Huddersfield* County Court. On the 7th of April the trustees summoned the debtor and his son, *William Firth*, who had taken an active part in the management of the business, for examination under sect. 96 of the *Bankruptcy Act*, 1869, respecting the debtor's property. They attended the Court on the 11th of April, and were examined. The trustees had also, on the 7th of April, reported to the Court that, in their opinion, the debtor had been guilty of certain offences under the *Debtors Act*, 1869, and that the son had been guilty of aiding and abetting him in the commission of those offences, and the Judge directed a criminal prosecution of the debtor and his son. At the conclusion of the examination on the 11th of April they were both arrested, and were afterwards taken before the magistrates, and were remanded. On the 17th of April the debtor and his son were again summoned for examination under sect. 96. They attended to be examined on the 21st of April. The son was sworn, but he refused to answer some of the questions put to him by the trustees' counsel, on the ground that his doing so might tend to criminate himself. The Judge held that he was justified in his refusal, and against this ruling the trustees appealed to the Chief Judge. The appeal was heard on the 18th of June, 1877.

E. C. Willis, for the Appellants.

Winslow, Q.C., and *Lockwood*, for the witness.

BACON, C.J., dismissed the appeal with costs, upon the ground that no order had been drawn up containing the decision appealed from.

The trustees appealed. The appeal was heard on the 26th of July, 1877.

After the hearing of the appeal by the Chief Judge, the Judge of the County Court signed a certificate stating that he had not taken any notes of the examination of the debtor's son on the

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Argument.

21st of April, but certifying that the transcript of the notes taken by a shorthand writer contained a true account of what took place upon the examination.

De Gex, Q.C., and *E. C. Willis*, for the Appellants.

Winslow, Q.C., and *Howard Smith*, for the witness, objected that the merits had not been heard by the Chief Judge, his decision having been based on the technical ground that there was no order which could be appealed from.

THE COURT (*James*, *Baggallay*, and *Cotton*, L.JJ.) held that the certificate of the County Court Judge was a sufficient record of what took place before him, and said that they would hear the case on the merits.

De Gex, Q.C., and *E. C. Willis*, for the Appellants:—

A witness examined under sect. 96 (1) is bound to answer every question put to him about the bankrupt's property, and is not entitled to any protection on the ground that his answer might tend to criminate himself. The bankrupt himself clearly could claim no such protection, and sect. 96 puts all the persons it speaks of on the same footing.

It has always been held that examinations of this nature in bankruptcy are different from the ordinary examination of a witness in an action: *Ex parte Cossens* (2).

In *Reg.* v. *Scott* (3) it was held by the majority of the Judges that the enforced answers of a bankrupt, examined under sect.

(1) Sect. 96 provides that "The Court may, on the application of the trustee, at any time after an order of adjudication has been made against a bankrupt, summon before it the bankrupt or his wife, or any person whatever known or suspected to have in his possession any of the estate or effects belonging to the bankrupt, or supposed to be indebted to the bankrupt, or any person whom the Court may deem capable of giving information respecting the bankrupt, his trade dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the bankrupt, his dealings or property."

Sect. 97: "The Court may examine upon oath, either by word of mouth or by written interrogatories, any person so brought before it in manner aforesaid concerning the bankrupt, his dealings or property."

(2) Buck, 531.

(3) 25 L. J. (Mag. Cas.) 128.

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117 of the *Bankrupt Law Consolidation Act*, 1849, might be given in evidence by the prosecution on a criminal proceeding against the bankrupt, but *Coleridge*, J., dissented, and he said that under sects. 117, 118, and 120 of the Act of 1849 (which are similar in their terms to sect. 96 of the Act of 1869), the bankrupt's wife and any witness who had had dealings with him would be equally liable to be implicated in a criminal transaction, because they could not refuse to answer questions relating to the bankrupt's estate.

Winslow, Q.C., and *Howard Smith*, for the witness, were not heard.

JAMES, L.J.:—

Judgment, James, L.J.

I am of opinion that the order of the judge of the County Court was right. The question is, whether a mere witness who is summoned for examination under sect. 96 of the *Bankruptcy Act*, on the ground that he can give information with respect to a bankrupt's property, is entitled to avail himself of the privilege to which every other witness is entitled in the Courts of this country, that is to say, the privilege of claiming protection from answering questions put to him on the ground that by answering he might expose himself to criminal proceedings. Of course when a witness objects on this ground to answer a question the Judge will satisfy himself whether the objection is a genuine one. Subject to that, I am of opinion that such a witness is entitled to claim this protection. No doubt the bankrupt himself, when summoned under this section, is placed in a different position, because it is his duty to discover the whole of his estate and effects to his creditors, and he cannot be allowed to conceal a part of it by saying, "If I tell you where it is you will be able to prosecute me for a criminal offence." But this is a personal obligation of the bankrupt. In the absence of any authority to the contrary, I am of opinion that a mere witness summoned under this section stands in the same position as any other witness.

BAGGALLAY, L.J.:—

Baggallay, L.J.

I am of the same opinion.

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Ex parte SCHOFIELD. *In re* FIRTH.

Judgment. Cotton, L.J.

COTTON, L.J.:—

I am of the same opinion. The question is, whether a witness summoned under this section is able to protect himself from answering upon the common law principle that a witness is not bound to criminate himself. Does sect. 96 give the Court power to compel a witness to answer every question that may be put to him about the bankrupt's property? It would be a very strong thing to say that it has that effect. It is said that the case of *Reg.* v. *Scott* (1) amounts to a decision that a witness summoned under the Act of 1849 stood in the same position as the bankrupt himself. That point was certainly not decided, though a strong opinion to that effect was expressed by one of the Judges. The question decided related only to the bankrupt, and it was held that, whatever the result might be, he was bound to answer all the questions put to him respecting his property, and that his answers might be used as evidence against him as in a criminal prosecution. And *Coleridge*, J., who dissented from the majority of the Judges, based his decision partly on the ground that, not only the bankrupt, but any other person summoned for examination as to his property, would be placed in the same position. But the question we have to decide really amounts to this, what is the proper construction of sect. 96? I cannot construe it as taking away from a mere witness that protection to which he is entitled by the common law. I think such a person is entitled to the same protection as that to which he would be entitled if he were subpœnaed as a witness in an action.

Solicitor for Trustees: *J. W. Sykes*, agent for *Ramsden & Sykes, Huddersfield.*

Solicitors for Witness: *C. J. Inglis*, agent for *G. Rhodes, Halifax.*

(1) 25 L. J. (Mag. Cas.) 128.

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Ex parte SHEEN. *In re* WRIGHT.

C. A. 1877 July 19, 26.

Proof by Partner—Joint Estate—Ostensible Partner—Holding out as Partner to a small Number of Creditors.

A person, who was alleged to have held himself out as a partner with a trader to three of his creditors, claimed to prove a debt in the trader's separate liquidation. Two of the three creditors had also proved in that liquidation. The third was fully secured, but had taken no proceedings against the *quasi* partner:—

Held (affirming the decision of *Bacon*, C.J.), that the *quasi* partner was entitled to prove.

Per James, L.J.:—A person who has held himself out as a partner with a trader to a small number of the creditors of the latter, is not thereby precluded from proving in the separate bankruptcy of the trader—his estate being insufficient to leave a surplus—for a debt due to him from the trader.

Statement.

IN the liquidation of *James Wright*, a wine merchant at *Manchester*, who had traded as *James Wright & Co.*, a proof was tendered by *James Crabtree* for £1463 5*s.* 8*d.*, money lent to the debtor. The trustee in the liquidation rejected the proof, on the ground that *Crabtree* was a partner with the debtor, and was therefore not entitled to prove until all the joint creditors had been paid in full. *Crabtree* applied to the County Court at *Manchester* for an order that the trustee should admit the proof. Issues were tried before the Judge on the 7th of April, 1877, when, upon the evidence, His Honour found that *Crabtree* was a partner with *Wright*, and that he was not entitled to prove in the liquidation. *Crabtree* appealed to the Chief Judge. The appeal was heard on the 11th of June, 1877. It was admitted that the separate estate was not sufficient to pay the separate creditors 20*s.* in the pound.

Winslow, Q.C., and *Bigham*, for the Appellant.

De Gex, Q.C., and *Taylor*, for the trustee.

BACON, C.J., held, upon the evidence, that *Crabtree* was not a partner with *Wright*, and that he was entitled to prove. And his Lordship ordered the finding of the County Court Judge to be set

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aside and his order to be discharged, and ordered that the trustee should admit the proof.

The trustee appealed. The appeal was heard on the 19th and 26th of July, 1877.

Argument.

De Gex, Q.C., and *Taylor*, for the Appellant:—

The evidence shews that there was an actual partnership. The County Court Judge had the advantage of hearing the witnesses, and his finding on a question of fact ought not to have been disturbed. At any rate, the evidence shews that *Crabtree* held himself out to three of the creditors as a partner, or permitted *Wright* so to hold him out, and, if so, the ordinary rule against proof by a partner in competition with his creditors applies.

Winslow, Q.C., and *Bigham*, for *Crabtree*:—

The proper conclusion from the evidence is, as the Chief Judge has decided, that there was no partnership in fact. The trustee clearly did not suppose there had been a partnership, for he has always treated the estate and has divided it as separate estate. Moreover, the creditors who say that they believed *Crabtree* to be a partner have proved against *Wright* alone, making the ordinary affidavit that he alone was indebted to them. That is not the proper way of proving a joint debt, and they cannot afterwards be allowed to proceed against *Crabtree*. Indeed, there being a solvent partner, there would be no right of proof against *Wright*: *Ex parte Buckingham* (1); *Ex parte Field* (2). If there is a joint liability, these creditors ought not to have proved against the separate estate of *Wright*, and if there is no joint liability they have no right against *Crabtree*. Again, the rule that a partner cannot prove in competition with his own creditors does not apply to a case like this, where there is no joint estate, and nothing available for the joint creditors: *Ex parte Topping* (3). There a partner was allowed to prove against the separate estate of his co-partner, when it was admitted that, whether he did so or not, there could be no surplus of the separate estate available for the joint cre-

(1) 1 M. D. & D. 235. (2) 3 M. D. & D. 95.
(3) 4 D. J. & S. 551.

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ditors. *Ex parte Turquand* (1) is also in our favour. The evidence does not prove that *Crabtree* was held out as a partner, but if he was, the creditors to whom the representation was made have a personal remedy against him, and they have nothing more.

Argument.

De Gex, in reply:—

A representation that there is a partnership is sufficient to create joint estate; it is created by reputed ownership: *Ex parte Arbouin* (2).

[JAMES, L.J.:—That means a representation that there is a joint estate.]

A man who has represented himself to be a partner cannot be heard to say that he was not a real partner: *Ex parte Good* (3). Therefore such a person is within the rule which prevents a partner from proving in competition with his creditors.

JAMES, L.J.:—

Judgment, James, L.J.

I am of opinion that the order of the Chief Judge must be affirmed. It is to my mind perfectly clear from the evidence that there never was any actual partnership between these two gentlemen, and in my opinion also there was no ostensible partnership, no holding out to the world, that is, to the creditors generally, that there was a partnership. If there had been, we should have heard more about it. There was no holding out to the world that there was a partnership, or that the stock-in-trade was that of a partnership, so as to make it joint estate. There was nothing to make it joint estate, and the creditors generally never heard that any such partnership existed.

It is said, however, that there were three individuals to whom some representations were made by *Wright* in the presence and with the acquiescent silence of *Crabtree*, to the effect that the latter was a partner. I am of opinion that those representations, if they were made, and that silence on the part of *Crabtree*, if it really existed, whatever effect they might have upon *Crabtree's* personal liability to those three creditors, cannot have the effect of creating

(1) 11 L. J. (Bkcy.) 1. (2) De G. 359.
(3) 5 Ch. D. 46.

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Judgment, James, L.J.

a partnership for any purpose whatever of administration in bankruptcy. Those creditors, if they had any rights against *Crabtree*, have those rights against him still. It cannot be said that he is seeking to prove in competition with them. If he is their co-debtor they ought not to have proved in the liquidation at all; they ought to have enforced their rights against him as the solvent co-debtor. The solvent co-debtor is not precluded from proving his debt against the real debtor, for as there never was any joint estate, and it appears that there can be no surplus of the separate estate, he would not be taking away that which would otherwise go to pay the joint creditors. And that is the principle, as is clearly laid down by Lord *Westbury* in *Ex parte Topping* (1), upon which one partner is held to be not entitled to prove against the estate of his co-partner.

Upon the whole case, therefore, I am of opinion that there was no actual partnership and no ostensible partnership, and, even if there was any liability in the nature of a joint liability created by conduct, there is nothing in that to interfere with the right of *Crabtree* to prove against the estate of *Wright*.

The appeal must be dismissed with costs.

Baggallay, L.J. BAGGALLAY, L.J.:—

I am of the same opinion, and have nothing to add, except this, that I am not satisfied that there is any evidence of such a holding out of *Crabtree* as a partner to the three creditors named, or any of them, as would involve him in any personal liability to them.

Cotton, L.J. COTTON, L.J.:—

I have come to the same conclusion, and have only a word to add. That there was no partnership is clear; all the circumstances shew there was no actual partnership. Whether there was any holding out of *Crabtree* as a partner is open to more doubt. But these gentlemen, who, if they are right in saying that *Crabtree* held himself out as a partner, had a remedy against a solvent man, appear to have taken no proceedings whatever to enforce that claim. I think that, on the question of the effect of the

(1) 4 D. J. & S. 551.

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holding out, the case would have admitted of considerable argument, but I am not satisfied that there was really any holding out *Crabtree* as a partner.

C. A. 1877 *Ex parte* SHEEN. *In re* WRIGHT.

Solicitors for Trustee: *Gregory, Rowcliffes, & Rawle.*
Solicitor for *Crabtree*: *W. H. Tattam*, agent for *J. Ellis, Manchester.*

SELBY *v.* WHITTAKER.

C. A. 1877 V.-C. H. *March* 9. C. A. *July* 11; *Aug.* 1.

[1860 S. 264.]
[1877 W. 79.]

Will—Construction—Vesting.

A testator gave £6000 to trustees upon trust to pay the income of one moiety to his daughter *J.* for her life, and the income of the other moiety to his daughter *A.* for her life. And, from and immediately after the several deceases of each of the daughters "leaving lawful issue or other lineal descendants her or them surviving," upon trust "to pay, assign, and transfer" the fund of her or them so dying "unto her or their child or children or other lineal descendants respectively," to be equally divided between them if more than one, "such child or children or other lineal descendants to take *per stirpes* and not *per capita*, such principal trust moneys to be paid, assigned, and transferred to them respectively" at twenty-one, and the income in the meantime to be applied towards their maintenance and education; "but nevertheless the said parts or shares of the said child or children shall be absolute vested interests in him, her, or them immediately on the decease of his, her, or their respective parent or parents, and transmissible to his, her, or their executors or administrators respectively." There was a gift over, in case either of the daughters should die "without leaving any lawful issue or other lineal descendants her surviving," to the other daughter and her child or children or other lineal descendants. And, in case both of the daughters should die "without leaving any lawful issue or other lineal descendants her or them surviving," there was a gift over to other persons:—

Held, that children of a daughter who predeceased her did not take.

The decision of *Hall*, V.C., reversed.

Statement

THIS was an appeal from a decision of Vice-Chancellor *Hall*.

Thomas Whittaker, by his will, dated the 10th of February, 1817, gave and bequeathed (*inter alia*) to *C. G. Whittaker, George Selby*, and *James Selby*, the sum of £6000, upon trust for investment as therein mentioned, and upon further trust to pay and apply the interest and proceeds of the £6000, when and as the same should

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C. A. 1877 SELBY v. WHITTAKER. Statement.

become due and payable, in manner following; (that is to say) one moiety thereof unto and for the benefit of the testator's daughter *Jane Wood* for her life, and the other moiety unto and for the benefit of the testator's daughter *Arabella Wood* for her life. "And from and immediately after the several deceases of each of them the said *Jane Wood* and *Arabella Wood* leaving lawful issue or other lineal descendants her or them surviving, upon trust that they my said trustees do and shall pay, assign, and transfer the principal trust moneys, together with the securities in or upon which the same may then be laid out and invested, of her or them so dying unto her or their child or children or other lineal descendants respectively, to be equally divided between them if more than one share and share alike, such child or children or other lineal descendants to take *per stirpes* and not *per capita*, such principal trust moneys to be paid, assigned, and transferred to them respectively when and as they respectively shall attain the age of twenty-one years, and the interest and proceeds in the meantime, or so much thereof as my said trustees shall think necessary, to be paid and applied for and towards their maintenance and education; but nevertheless the said parts or shares of the said child or children of and in the said principal trust moneys shall be absolute vested interests in him, her, or them immediately on the decease of his, her, or their respective parent or parents, and transmissible to his, her, or their executors or administrators respectively. And in case either of them the said *Jane Wood* and *Arabella Wood* shall die without leaving any lawful issue or other lineal descendants her surviving, then upon trust that they my said trustees shall and do pay and apply the part or share of her so dying without issue or other lineal descendants surviving as aforesaid of and in the interest and proceeds of the said principal trust moneys, unto or for the benefit of the survivor of them for and during the term of her natural life . . . and after the decease of the survivor of them the said *Jane Wood* and *Arabella Wood*, upon trust that they my said trustees do and shall pay, assign, and transfer the part or share, parts or shares, of her so dying without leaving any lawful issue or other lineal descendants her surviving as aforesaid of and in the said principal trust moneys, together with the securities taken for the same, unto or for the benefit

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of the child or children or other lineal descendants of the other of them in equal shares and proportions, such children taking *per stirpes* and not *per capita*. And in case both of them the said *Jane Wood* and *Arabella Wood* shall happen to die without leaving any lawful issue or other lineal descendants her or them surviving as aforesaid," then upon other trusts which it is not necessary to state.

The testator died on the 22nd of December, 1819. In the year 1827 *Jane Wood* married *G. E. Whittaker*. He died in 1840. There were only three children of this marriage, viz., *G. L. La Roche Whittaker*, who died an infant in the lifetime of his mother, and two other children, who died immediately after their births. On the 13th of March, 1851, *Jane Whittaker* married *Henry Young*. There was no issue of this marriage. *Jane Young* died in 1876. On the 17th of October, 1829, *Arabella Wood* married *William Coleman Selby*. There were only seven children of this marriage, viz., *William Selby*, *Arabella Mary Jane Selby*, *George William Coleman Selby*, *Thomas Selby*, *Ellen Maria Selby*, *Constantine Selby*, and *Augustus Selby*. *William Selby* died under twenty-one, and in his mother's lifetime. The other six attained twenty-one. *Constantine Selby* died on the 2nd of May, 1874. *Augustus Selby* died on the 20th of May, 1871. *William Coleman Selby* took out administration to *William*, *Constantine*, and *Augustus Selby*.

In December, 1860, the suit of *Selby* v. *Whittaker* [1860 S. 264] was instituted by *Arabella Selby* against *C. G. Whittaker* and others for the execution of the trusts of the testator's will, so far as they referred to that moiety of the £6000 to which *Arabella Selby* was entitled for her life. By the decree made on the hearing of this cause on the 23rd of August, 1863, it was ordered that the dividends on the sum of £3058 Bank Annuities, which represented this moiety, and which had been transferred into Court, should be paid to the Plaintiff for her life.

Arabella Selby died on the 12th of April, 1876.

The action of *Selby* v. *Whittaker* [1877 W. 79] was brought by *Arabella Mary Jane Selby* for the execution of the trusts of the testator's will so far as they referred to the other moiety of the £6000.

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C. A. 1877 SELBY v. WHITTAKER.

W. C. Selby and *Arabella Mary Jane Selby* presented a petition in the suit and the action to obtain a distribution of the fund; and the question was when the shares of the children of *Arabella Selby* became absolutely vested in them.

The petition was heard before Vice-Chancellor *Hall* on the 9th of March, 1877.

Dickinson, Q.C., and *Everitt*, for the Petitioners.

Morgan, Q.C., and *Morshead*, for the other surviving children.

Whitehorne, for the trustees.

Judgment, V.-C. H.

HALL, V.C.:—

I must have regard to *Williams* v. *Clark* (1), *Chaffers* v. *Abell* (2), and *Dundas* v. *Wolfe-Murray* (3). In the last case the testatrix directed the trustees, immediately after her death, to raise £5000, and to pay the same equally between five nephews and nieces, the shares of sons to be payable on their respectively attaining twenty-one, and the shares of daughters at twenty-one or marriage respectively. There were two consecutive directions to pay, and Vice-Chancellor *Wood* held, apparently under the first direction, that the interests vested immediately on the death of the testator.

Putting out of consideration the words "or other lineal descendants her or them surviving," and not adverting at present to the clause which provides that the shares of the children shall be absolute vested interests immediately on the decease of their parents, the case would seem to me to be governed by the cases I have referred to, and by my own decision in *In re Orlebar's Settlement Trusts* (4). Then as to the words, "or other lineal descendants" occurring in the commencement of the trust, and the corresponding words which recur in the gift over, it is suggested that the repetition of those words makes a difference. I do not see that it does. I do not see that it affords a reason for taking a different view as to the class intended to take. Then does the introduction of the words "or other lineal descendants" make any difference? It is said that there being a provision made for "other lineal descendants" is a reason for not including in the

(1) 4 De G. & Sm. 472.
(2) 3 Jur. 577.
(3) 1 H. & M. 425.
(4) Law Rep. 20 Eq. 711.

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C. A. 1877 SELBY v. WHITTAKER. Judgment, V.-C. H.

class to take any children except those who survive the parent, because the issue of those who do not survive would be provided for under the description "or other lineal descendants." It is true that the issue would be provided for in that way, but the fact that they are provided for in that way does not the less render it necessary to construe the words, and in construing the words I am not at liberty to alter the *primâ facie* meaning of the words merely because the issue of those persons who are *primâ facie* included under the words of gift would be provided for if I were to put a construction upon those words other than the *primâ facie* and natural construction. That would be, as it seems to me, to make a will for the testator. Providing for issue does not always meet the necessities of families; it would leave a widow without any provision. Therefore I shall not do otherwise than adopt the natural construction of the words. I think I am warranted in doing so by the authorities to which I referred in *In re Orlebar's Settlement Trusts* (1). Then it is said that the clause which provides that the shares of the children shall be absolute vested interests on the decease of their respective parents shews that they were not to be vested at any other time. But the expression is "absolute vested interests," and I take that to mean something different from merely vested interests. I take it that that clause only means this, that when the parent of the children had died, from that time there should be no further substitution of lineal descendants. There was to be a stop put to substitution then, and the object of the clause was to make that clear. The fund will therefore be divided into sevenths, three of which will go to the Petitioner *W. C. Selby*, as administrator of the three deceased children.

C. A.

The four children who survived the tenant for life appealed. The appeal was heard on the 11th of July and the 1st of August.

Argument.

Morgan, Q.C., and *Morshead*, for the Appellants:—

We say that the shares did not vest till the death of the tenant for life: *Theobald* on Wills (2); *In re Deighton's Settled Estates* (3);

(1) Law Rep. 20 Eq. 711. (2) Pages 283, 284.
(3) 2 Ch. D. 788.

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C. A. 1877 SELBY v. WHITTAKER. Argument.

In re Willmott's Trusts (1). If there is a gift to the children of *A.* if he dies leaving children, and if he dies without leaving any, then over, no child takes who does not survive him: *Winn* v. *Fenwick* (2): *Wilson* v. *Mount* (3); *Stevens* v. *Pyle* (4); *Stolworthy* v. *Sancroft* (5). The direction that the shares shall vest at the death of the tenant for life excludes their vesting at any earlier time: *Glanvill* v. *Glanvill* (6).

[They also referred to *In re Orlebar's Settlement Trusts* (7).]

Dickinson, Q.C., and *Everitt*, for *W. C. Selby*, the representative of the three children who died before the tenant for life:—

Boulton v. *Beard* (8) shews that there is no general rule that a class is to be ascertained at the period when, if no member of it is living, the property goes over. In the present case, the gift ought to be construed as a gift to children, subject to a provision that if any die in the lifetime of the tenant for life leaving issue the issue are substituted for their parents. The condition that the children should outlive the tenant for life is not made part of the gift itself as it was in *In re Watson's Trust* (9). The direction to pay at twenty-one is intended to provide for the event of children being infants at the death of the tenant for life, but the interests are to be vested on the parent's death. The issue are only to be substituted for the children in case they die leaving issue during the parent's life. Otherwise the interest originally created is not divested, except in the event of there being no child or issue of a child living at the death of the tenant for life. The fact that there is no gift, except in a direction to pay and transfer, does not necessarily make the gift contingent: *In re Bennett's Trust* (10). *Jeyes* v. *Savage* (11) was the case of a settlement, and in *In re Deighton's Settled Estates* (12), there were the words "then living," which do not occur in the present case. Vested interests are given in the first instance. Nothing is said about the interests of children who leave no issue. Why is the original gift to them to

(1) Law Rep. 7 Eq. 532.
(2) 11 Beav. 438.
(3) 19 Beav. 292.
(4) 30 Beav. 284.
(5) 12 W. R. 635.
(6) 2 Mer. 38.
(7) Law Rep. 20 Eq. 711.
(8) 3 D. M. & G. 608.
(9) Law Rep. 10 Eq. 36.
(10) 3 K. & J. 280.
(11) Law Rep. 10 Ch. 555.
(12) 2 Ch. D. 783.

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be cut down? *M'Lachlan* v. *Taitt* (1) and *Taylor* v. *Frobisher* (2) are also authorities in our favour.

Whitehorne, for the trustees.

JESSEL, M.R.:—

Judgment, C. A. Jessel, M.R.

The will which we have to construe was undoubtedly drawn by a lawyer, for there are well-known technical terms made use of.

I always distrust myself in construing these obscure instruments, because I know perfectly well that that which appears quite clear to the mind of one Judge may appear doubtful to the mind of another, and may appear quite clear the other way to the mind of a third, and therefore when I say that I have a clear and positive opinion upon the construction of this will, it must be taken subject to that observation.

As far as I can form an opinion, it appears to me that the gift to the children is clearly contingent on their surviving their parent.

Now the gift is open to several observations on the ground of what I may call the indications of intention that the children shall take only in that contingency.

It is a gift to the two daughters of the testator for their respective lives, in equal moieties, and then "from and immediately after the several deceases of each of them leaving lawful issue or other lineal descendants her or them surviving," upon certain trusts for those children or other lineal descendants. Now upon those words standing alone there is to my mind a very strong, though not conclusive, indication of intention that only those children who survive the parent shall take. The only event in which there is a gift is upon their "leaving lawful issue or other lineal descendants." I fully admit that on the authorities and on the reason of the thing, if that stood alone followed by an immediate gift to children, though it might appear to be and would be a very capricious intention, because it would make the interests of the children, if they all died in their parents' lifetime, depend on whether one of them had left a grandchild who would not take anything, still, there being no other words, that would not be

(1) 28 Beav. 407; 2 D. F. & J. 449. (2) 5 De G. & Sm. 191.

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sufficient to make the interests of the children contingent on their surviving their parents. It would be a remarkably capricious intention, making the interests of the children dependent upon an extraneous fact, but still it would not be an impossible intention.

Then the will goes on: "Upon trust that my said trustees do and shall pay, assign, and transfer the trust moneys of her or them so dying unto her or their child or children or other lineal descendants respectively, to be equally divided between them if more than one share and share alike, such child or children or other lineal descendants to take *per stirpes* and not *per capita*, such principal trust moneys to be paid, assigned, and transferred to them respectively when and as they respectively shall attain the age of twenty-one years, and the interest and proceeds in the meantime, or so much thereof as my said trustees shall think necessary, to be paid and applied for and towards their maintenance and education." Now that paragraph appears to me to contain very strong indications of intention that the children are only to take in the event of their surviving their parents. In the first place, the only gift is in the direction to pay and transfer at twenty-one. The first words are, "to pay, assign, and transfer to the children or other lineal descendants," and that is explained afterwards, as "to pay, assign, and transfer at twenty-one." So that you have the testator imagining, at all events, that there will be some person to accept the payment or transfer after the death of the daughters, That, standing alone, is not conclusive, for it has been decided, and I think rightly, that if there is nothing else in a will but a gift to one for life with a direction afterwards "to pay and transfer" to the children of that person or to the children of some one else, the interests of those children are vested on the testator's death. But it by no means follows that, because standing alone those words are not sufficient to import a contingency, they will not, in combination with other indications of intention, import a contingency. Well, the next thing is a gift to the child or children or other lineal descendants *per stirpes*. Now, as I read it, they take all together as one class; they take separate shares and they take at different times. They take separate shares because the children are to take by stocks, which excludes the children of a living ancestor, and they take at different times, because the

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shares are to be paid at twenty-one, and it is not necessary to a class gift that every member of the class shall take the same share, or shall take at the same time. If there is a gift, "To all my children, but the shares of the sons shall be double those of the daughters," that is still a class gift, although the sons take double the shares of the daughters, or if there is a gift, which is very familiar to us all, to sons and daughters, the shares of the sons to be vested at twenty-one and the shares of the daughters to be vested at twenty-one or marriage, that is still a class gift, although the shares vest at different periods. I cannot find anything in this portion of the will to make it otherwise than a class gift, and I cannot find any substitution in the strict sense of the word, that is, a substitution of one class for another class. It is a double class composed of different elements, but still it is a class.

Then the will goes on, "but nevertheless the said parts or shares of the said child or children of and in the said principal trust moneys shall be absolute vested interests in him, her, or them immediately on the decease of his, her, or their respective parent or parents, and transmissible to his, her, or their executors or administrators respectively." That, no doubt, is a very important clause. First of all, whether you read the words "child or children" in that clause literally, or whether you read them, as I rather think they ought to be read, as equivalent to "all the issue hereinbefore mentioned," although that would not be quite accurate, they are to be absolute vested interests immediately on the decease of the parent.

Now there can be nothing better settled than that when a testator directs that an interest is to be vested at one time, he means that it is not to be vested at any other time. That is the literal meaning of the words, and we should do violence to their meaning if we held that the interests were vested at any other time.

But it is said that the words do not mean vested in the strict sense, but that the children are to be entitled in possession at that time. That cannot be so, because they are not necessarily entitled in possession at the death of the tenant for life. They are not to be entitled in possession until they attain twenty-one, that is, to take possession as distinguished from being entitled in right or

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interest. Then it is said that the words mean "indefeasibly vested." No doubt they do. Absolutely vested and indefeasibly vested are the same thing. But where is the defeasance? You have to manufacture a defeasance by construction in order to apply these words to it. There is no defeasance, as I read it, and therefore there is no possibility of saying that the word "vested" has any other than its literal meaning.

Then, lastly, there is the gift over, "And in case both of them the said *Jane Wood* and *Arabella Wood* shall happen to die without leaving any lawful issue or other lineal descendants her or them surviving as aforesaid," then upon trust for other persons. Now the same observations apply to the gift over as to the preceding gift; it is the same thing in a different form. I take it that no rule of construction is better settled than that, when two meanings are open to a Judge, and the one is reasonable and sensible, and the other, though not absolutely unreasonable in the sense of supposing that the testator must have been a lunatic, yet is extremely unlikely, he ought to select that meaning which is consonant to ordinary reason, and not liable to the imputation of excessive caprice. Therefore, on that ground also, I should prefer the construction which I have mentioned. I must say that I very much prefer to adhere as far as possible to the words, unless I find an obvious indication of intention that those words are not to have their proper meaning and effect, more especially in a technical will like this, in which we cannot suppose that the words were used carelessly or without an intention that they should have some meaning. It appears to me, looking at this gift as a whole, and looking at it in all its parts, and taking the indications of intention as being cumulative, that we must arrive at this result, that the testator did not intend any child who predeceased his daughters to take any share under the bequest. I think, therefore, with great deference to the Vice-Chancellor, that his decision must be reversed.

James, L.J.

JAMES, L.J.:—

I am of the same opinion.

If the testator could have heard the discussion which has taken place on this matter, I think he would be monstrously surprised at

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the supposition that he could have meant that which is imputed to him.

A testator gives a sum of money, £3000, to a daughter for her life, and then he says that if she should die leaving issue or descendants, then he gives it to her issue or descendants, but if she should die without leaving any issue or descendants, then it is to go over to somebody else. It is said that he means this—that if she dies leaving one descendant, the whole of her children and descendants, whether they survive her or not, are to share in the property, but that if there is not one of them living at her death, then none of them takes anything. That is a most monstrous and capricious intention to attribute to any testator.

Now the question is, whether we are bound by any authority, or by any rule of construction which has acquired authority, to attribute to the testator such an intention as that. No doubt there are rules of construction which have been laid down for the purpose of securing vested interests, and, for the reason which is mentioned in one of the cases referred to by Mr. *Dickinson*, that where a testator provides for his children, those children who were objects of his bounty might otherwise lose their shares, though they might leave children themselves. It is very natural and very proper in such a case to suppose that the testator could not have intended that the family of a child who predeceased the tenant for life should be left without the share which was given to that branch of the family. But that has really no application to a case like the present, where the testator has carefully provided, not only for children, but also for other descendants, so that no branch of the family living at the death of the tenant for life could by any possibility be deprived of the share given by this will. Therefore there is no reason why we should put any other than the plain and reasonable construction on the words in order to secure that equal division between his descendants which it is always supposed a testator must have intended. Here you begin with a gift to children or descendants to take *per stirpes* and not *per capita*. It is a division between the branches of the family then living. And then the objects of the bounty are to receive their shares at twenty-one. This is quite inconsistent with the notion that a child who had lived only for a few minutes was to

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take a vested interest only for the purpose of giving that interest to some person to whom no benefit is in any other way intended to be given by the testator. The subsequent clause as to vesting appears to me to put it beyond all possibility of doubt. Even without that clause I should myself have struggled very hard with the authorities, if it had been necessary to do so, in order not to say judicially that the testator meant something which I am as satisfied as I can be of anything in the world that he never did mean. But when the testator, or the lawyer who prepared his will, has inserted that clause, it is consistent with ordinary and common sense that he meant that the shares were to be vested only on the death of the tenant for life, in other words, were not to be transmissible until then. This construction, it appears to me, makes the will a reasonable and sensible will, instead of a most unreasonable and insensible will.

Baggallay, L.J. BAGGALLAY, L.J.:—

I am of the same opinion. I entirely assent to the principle enunciated by Lord Justice *Turner* in the case of *Boulton* v. *Beard* (1), to the effect that there is no rule that where there is a gift to a class upon a contingent event the time of the happening of the contingency determines the individuals composing the class. There is no such general rule, but at the same time the circumstance that the gift is only to take effect upon the happening of a particular contingency is a circumstance to be taken into consideration in combination with other indications of the testator's intention to be found in other parts of his will. I think that in the present case such an indication is to be found in the fact that the gift itself is to the child or children or other lineal descendants of the testator's daughters to take *per stirpes*.

It appears to me that the only reasonable construction is that the gift is to those children only who survive the daughters. I think that would be the fair inference from the gift itself. But any doubt appears to me to be entirely removed by the vesting clause. The testator has made provision for the very possible event that the children of his daughters might be under age at the time when the daughters died; therefore the fund is to be paid to them when

(1) 3 D. M. & G. 608.

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they attain twenty-one. And then comes the provision that their interests are to be absolutely vested on the decease of their parent, and, that being so, it appears to me that the idea that they could become absolutely vested at any other time is utterly excluded.

Judgment, C. A. Cotton, L.J.

COTTON, L.J.:—

I have not heard all the arguments in support of the appeal, but I have heard, I believe, the whole of the arguments in support of the Vice-Chancellor's decision. If I had not heard them I should not have ventured to express any opinion.

As I understand the case, the only question which arises is whether three children of one of the daughters who died during the lifetime of their parent took transmissible interests in the fund.

In construing a will we must be careful not to disregard any rule or canon of construction which has been laid down, but subject to that we must look at the words of the will and see what their meaning is. I do not think that this will is entirely free from doubt, but, as I understand, the only rule which has been pressed upon us is this, that the Court in construing wills favours that construction which will give vested interests at as early a period as possible to children.

Now what is the effect and meaning of that rule? It is a rule which is to be applied to a will in order to see whether there is a sufficient indication of intention that the interests of children shall not vest at their birth. In the present case the gift to the children is made contingent on there being issue surviving the parent, and in the event of there being no issue surviving the parent other persons are made the objects of the testator's bounty. Having regard to that, it is very improbable that these three children should take vested interests when, had there been no other issue surviving the parent, they would not have taken anything. Of course that is not conclusive; but looking at the whole of the clauses, and having regard to those considerations which have been pointed out by the Lord Justice, I think that any person reading the will fairly, as a matter of common sense, would say that the intention was to provide only for those children or issue who were living at the death of the parent.

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I am of opinion, therefore, that the children who died in the lifetime of the parent without issue did not take vested interests.

Solicitors: *G. Burges; Mackeson, Taylor, & Arnould; Kingsford, Dorman, & Kingsford.*

C. A. 1877 *Aug.* 8.

EARL OF LEWES *v.* BARNETT.

[1876 L. 110.]

Bankruptcy—Attachment—Breach of Trust—Bankruptcy Act, 1869, *s.* 12—*Debtors Act*, 1869, *s.* 4.

Leave was given to issue an attachment against a Defendant for non-payment of money, being a default by a person acting in a fiduciary capacity. He was attached and put in prison. He then filed a declaration of insolvency and was adjudicated bankrupt, and applied for his discharge. Vice-Chancellor *Malins* refused the application, saying that the bankrupt, if so advised, might renew his application after he had passed his final examination.

Held, on appeal, that this refusal was right.

Cobham v. *Dalton* (1) distinguished.

Statement.

THIS was an appeal by the Defendant *Barnett* from a decision of Vice-Chancellor *Malins*, refusing to discharge him out of custody.

On the 20th of July, 1876, an order was made in the action that the Defendants, *Barnett & Pain*, should, on or before the 26th instant, pay the sum of £2000 into Court. This order was affirmed by the Court of Appeal.

The money was not paid, and on the 8th of August Vice-Chancellor *Malins* gave leave to issue an attachment. A difficulty occurred in drawing up the order, owing to an informality in the service of the order of the 20th of July, and on the 15th of August an order was made by the vacation Judge that the money should be paid in by the 21st. The money not having been paid in, an order dated the 29th of August, 1876, was made by the vacation Judge, giving leave to the Plaintiff to issue an attachment or attachments against the Defendants, prefaced by the words "it appearing that the Defendants have made default in

(1) Law Rep. 10 Ch. 655.

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payment of the said sum of £2000 into Court, as directed by the said order, and that such default is the default of trustees or persons acting in a fiduciary character ordered to pay a sum in their possession or under their control within the meaning of the *Debtors Act*, 1869."

Statement.

On the 5th of September an attachment was issued, and on the 15th of March, 1877, *Barnett* was attached and committed to *Holloway Prison*, where he had since remained.

On the 3rd of August *Barnett* gave notice of motion for his discharge from custody, in support of which an affidavit was filed, stating that on the 3rd of August a petition was presented to the *London* Bankruptcy Court, and that upon such petition *Barnett* was duly adjudged a bankrupt, that a day had been appointed for the first meeting of creditors, and that one of the Registrars had been appointed trustee of the bankrupt's estate and property. It was stated at the bar, and not contradicted, that the act of bankruptcy was a declaration of insolvency by *Barnett*, and that the proceedings were taken by a friendly creditor.

The motion was made on the 7th of August, and Vice-Chancellor *Malins* refused to make any order, stating that the bankrupt, if so advised, might renew his application after he had passed his final examination. *Barnett* appealed.

Argument.

J. Pearson, Q.C., for the Appellant:—

The object of the exception in the *Debtors Act* in cases like the present was not to imprison a man as a punishment for misconduct, but to make him pay. He is considered to be wilfully disobeying the order for payment, and when bankruptcy has taken away all his property the wilful disobedience ends. If he had money in hand now he could not lawfully pay—the only mode of obtaining payment is by proof. The exception in the Act is founded on the presumption that he can pay and will not, which is now at an end. The 12th section of the *Bankruptcy Act*, 1869, is express on that subject: *Cobham* v. *Dalton* (1).

[COTTON, L.J.:—In that case the party was bankrupt at the time of the attachment. Here the attachment was indisputably regular.]

(1) Law Rep. 10 Ch. 655.

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Glasse, Q.C., and *Higgins*, Q.C., *contrà*, were not called upon.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that the order of the Vice-Chancellor is quite right. The Defendant was properly attached for default in payment of money ordered to be paid by him as a person acting in a fiduciary capacity. He now asks to be discharged, and his case is, "I have disabled myself from paying by committing an act of bankruptcy, and getting some one to present a petition for adjudication." It appears to me idle to say that a man can, by producing in himself an inability to obey an order, discharge himself from the consequences of disobeying it. The *Bankruptcy Act*, 1869, s. 12, only says that a creditor shall not have any remedy against the property or person of a bankrupt in respect of the debt, except in manner provided by the Act. Here the creditor is not seeking any remedy, he has not taken any step since the adjudication, he has merely left matters as they were. The Vice-Chancellor has said, "When I see what the accounts are, and what assets there are, you may come again." I am of opinion that the order is quite right.

Baggallay, L.J.

BAGGALLAY, L.J.:—

I am of the same opinion. *Cobham* v. *Dalton* (1) does not govern this case, for there the attachment issued after the bankruptcy.

Cotton, L.J.

COTTON, L.J.:—

I also pointed out the distinction between this case and *Cobham* v. *Dalton* in the course of the argument. Here there was a good attachment before the bankruptcy, and the case does not come within the *Bankruptcy Act*, 1869, s. 12, by which the Court in that case considered itself bound. When the bankrupt has passed his examination and done his best to enable his creditors to get the benefit of his property, he can apply again.

Solicitors: *F. Heritage & Co.*; *E. T. Lewis.*

(1) Law Rep. 10 Ch. 655.

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Ex parte COOPER. *In re* JOSEPH.

C. A. 1877 Aug. 2.

Liquidation—Receiver—Appointment by Creditors—Confirmation by Court—Appeal—Locus Standi—Bankruptcy Rules, 1870, *r.* 262.

Immediately after a debtor had filed a liquidation petition two sets of persons, each professing to be a majority in value of his creditors, respectively signed two nomination papers under rule 262 of the Bankruptcy Rules, 1870, nominating and appointing two different persons to be receiver of the debtor's property. Upon the application of one of these sets of persons the Registrar appointed their nominee receiver:—

Held, that the nominee of the other persons had no *locus standi* to appeal from the Registrar's order, though the persons who had nominated him would have had a right to appeal.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, sitting as Chief Judge in Bankruptcy.

On the 4th of July, 1877, *Alfred Joseph*, an importer of foreign goods, filed a liquidation petition. On the 5th of July a number of persons professing to be a majority in value of the creditors signed a nomination paper, nominating and appointing *T. H. Cooper* to be receiver and manager of the trade effects and business of the debtor, pending the resolution to be come to by the creditors. On the same day some other persons (also professing to be a majority in value of the creditors) signed another nomination paper, nominating and appointing *Arthur Barrow* to be receiver and manager. On the 7th of July the Registrar, upon the application of the creditors who had nominated *Barrow*, appointed him receiver of the debtor's property, and ordered that he should take immediate possession. From this order *Cooper* appealed.

Argument.

Winslow, Q.C., and *Bagley*, for the Appellant.

Finlay Knight (*Roxburgh*, Q.C., with him), for *Barrow*:—

The Appellant has no *locus standi* to appeal. He has no interest in the matter except in getting his commission on what he may receive.

Winslow, Q.C., and *Bagley*, for the Appellant:—

The Appellant has been duly appointed by the majority of the

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creditors under rule 262 of the Bankruptcy Rules, 1870. He finds some one else obstructing him when he attempts to take possession, and he has a right to come and ask the Court, whose officer he is, to assist him in obtaining possession.

Judgment, James, L.J.

JAMES, L.J.:—

We cannot allow a mere receiver to appeal in this way. The Court has said to him, You need not trouble yourself any more in the matter. If the creditors who nominated him had appealed, we must have heard them. But a receiver has no vested right in his appointment. He is not entitled to litigate for the profits of the receivership. His sole interest is in respect of his percentage.

BAGGALLAY and COTTON, L.JJ., concurred.

Solicitors for Appellant: *Evans & Eagles.*
Solicitors for *Barrow: Linklater, Hackwood, & Co.*

C. A. 1877 V.-C. H. *April* 28. C. A. *June* 9.

In re LEIGH'S ESTATE. ROWCLIFFE *v.* LEIGH.

[1875 L. 100.]

Practice—Discovery—Irrelevancy—Rules of Court, 1875, *Order* XXXI., *r.* 19—*Evidence of Custom.*

In an administration action a horsedealer brought a claim against the estate of the testator for charges connected with the purchase and sale of horses for the testator, and for the standing of horses at livery, for several years. The executrix disputed the amount charged, and alleged that the horsedealer had sold several horses, as agent for the testator, on commission, and asked for discovery of entries in the horsedealer's books relating to the sales. The horsedealer alleged that he had never sold horses on commission as agent for the testator, but on the terms that he should pay the testator a fixed sum for each horse and sell it again on his own account for what he pleased, retaining the difference, if any, by way of profit; and that this was the custom of all horsedealers of good standing. And he declined to disclose the prices at which he had sold the horses as being irrelevant to the issue, namely, what the agreement or course of dealing between himself and the testator was:—

Held (reversing the decision of *Hall*, V.C.), that the discovery was irrele-

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vant to the issue; and the Court, in exercise of its discretion under Rules of Court, 1875, Order XXXI., rule 19, refused to order discovery to be made except as to the dates of the sales.

Evidence of the course of dealing of other horsedealers admitted to shew that the alleged agreement with the testator was not an unreasonable one.

IN this case a claim was brought by Mr. *S. B. Sheward*, a horse-dealer in *Green Street*, against the estate of Mr. *John Gerard Leigh*, whose estate was being administered in the above-mentioned action, for a large sum of money as the balance due to him in respect of the account of Mr. *Leigh* with the claimant and his late partner, for charges incurred in connection with the purchase and sale of horses for Mr. *Leigh*, and for the standing of various horses at livery. For the purpose of resisting this claim, the Defendant, who was the executrix of Mr. *Leigh*, required Mr. *Sheward* to make an affidavit of the documents in his possession relating to the matters in question. Mr. *Sheward* accordingly made an affidavit, in which he scheduled a great number of books, letters, and other documents, but claimed to seal up certain parts of some of the books, and in particular of certain books called the "horse books," as not material to his said claim.

The Defendant then took out a summons to consider the sufficiency of Mr. *Sheward's* affidavit, and calling upon him to make a further affidavit stating whether any, and if any, what portions of the sealed-up parts of the three books known as "horse books," and of the sealed-up parts of the other books mentioned in his affidavit, contained any entries relating to horses sold to or bought from, or alleged to be sold to or brought from, the testator, or any entries relating to the prices at or for which and the persons to whom the said *S. B. Sheward* had sold horses mentioned or referred to in his accounts or claim in this matter; and that he might be ordered to unseal and produce such entries. This summons was adjourned into Court.

The Defendant contended that Mr. *Sheward* bought and sold horses as agent for the testator, and charged a commission on such purchases and sales, and she therefore claimed to see the entries which had been sealed up in order to ascertain the prices at which Mr. *Sheward* had bought and sold the horses.

Mr. *Sheward*, on the other hand, denied that he acted as the

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testator's agent, or that he ever sold horses for him on commission. He filed an affidavit in which he stated that the course of business pursued between himself and Mr. *Leigh* was that in the case of horses sold by him to Mr. *Leigh* the prices were fixed and agreed on between them at the times of the respective sales; and he therefore objected to produce the items relating to such horses before the entry of such sales; that as to horses purchased and repurchased by him from Mr. *Leigh*, the prices of such horses were also in each case fixed and agreed on, and on each purchase or repurchase being completed, the horse so sold became the absolute property of him (Mr. *Sheward*), and was held by him at his own risk and expense, and he therefore objected to produce any of the items relating to his subsequent dealings with such horses on the ground that Mr. *Leigh* had no further interest therein.

With reference to horses placed in the hands of Mr. *Sheward* by Mr. *Leigh* for sale, he stated as follows: "I say that the said *J. G. Leigh* fixed and stated the sums which he was willing to accept for the last-mentioned horses, and it was agreed between us that I was to sell the said horses for the best prices I could obtain for the same, and that the difference between the sums fixed by the said *J. G. Leigh* and the actual prices which I obtained for the same horses were to belong to me as my remuneration for selling the same. I have never sold a horse on commission for any one. It would not answer my purpose to do so, as the sale of another person's horse would usually deprive me of the sale of one of my own horses. I have never charged the said *J. G. Leigh* commission on selling horses, my remuneration being the aforesaid difference between the sums named by him and the sums at which such horses were sold." He therefore objected to disclose the items shewing the names of the persons to whom he had sold such horses, or the prices at which he had sold them.

Mr. *Sheward* also tendered affidavits by Mr. *G. T. Cox*, Mr. *G. Rice*, and Mr. *W. A. Sewell*, horsedealers in *London*, in which they stated that "it is the universal practice with dealers of high standing not to sell horses on commission, and that the usual agreement is for the owner of a horse to fix the price at which he is willing to sell, and the dealer to be at liberty to get the best price he can for the horse, and the difference of the two prices to belong to the horsedealer."

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He also tendered evidence from several of his customers that they had dealt with him on those terms. The summons was heard before Vice-Chancellor *Hall* on the 28th of April, 1877.

Dickinson, Q.C., and *Methold*, for Mrs. *Leigh*, the executrix, contended that Mr. *Sheward* was the agent of the testator, and that the executrix was entitled to production of all the entries of the transactions on his behalf. The agreement alleged by Mr. *Sheward* was unreasonable, and the evidence of his dealings with his other customers and of dealings of other horsedealers on the same terms was not admissible, for no general custom was alleged: *Hollingham* v. *Head* (1); *Howard* v. *Sheward* (2).

W. Pearson, Q.C., and *Daniel Jones*, for Mr. *Sheward*, contended that by the practice of the Court before the *Judicature Act*, and now under Rules of Court, 1875, Order XXXI., rule 19, the Court would not order production of the entries in question until the question was first determined whether Mr. *Sheward* was the agent of the testator, or under what agreement they carried on business together: *Wood* v. *Anglo-Italian Bank* (3). For the purpose of proving this agreement the evidence tendered was admissible.

Dickinson, in reply.

Judgment. V.-C. H.

HALL, V.C.:—

The admissibility or inadmissibility of this evidence when this claim comes on to be disposed of is a question which I do not mean to determine finally upon the present occasion. The question before me is as to the production now of documents with reference to and for the purpose of what may be called the hearing of the cause, for although it arises upon a claim in Chambers, and therefore there will not be in strictness any hearing of the cause, it is in effect the same as an ordinary application by a Plaintiff or Defendant for the purpose during the progress and before the hearing of a cause.

That being so, it is said that I ought not, under the circumstances of this case, to make any order as to the production of

(1) 4 C. B. (N.S.) 388. (2) Law Rep. 2 C. P. 148.
(3) 34 L. T. (N.S.) 255.

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C. A. 1877 — *In re* LEIGH'S ESTATE. ROWCLIFFE v. LEIGH. — Judgment, V.-C. H.

these documents at the present stage, but that I ought first to have tried the preliminary question, which will be in fact the question at the hearing, namely, what was the contract between the parties. Mr. *Dickinson's* client seeks the production of the documents in question in aid of her case and contention, as being documents containing entries which relate to the subject-matter of the contract between the parties. On the other hand, it is said that the sales were made, not for Mr. *Leigh* at all, but for the claimant himself; and that whenever the price of a horse was fixed between the claimant and Mr. *Leigh*, the horse ceased to be the property of Mr. *Leigh*, and when it was actually sold, the claimant took the whole proceeds, and accounted to Mr. *Leigh* for the fixed price only. Was that the nature of the dealings and contract between the parties? That is the matter to be investigated, and Mrs. *Leigh* says, I think it will assist me if I see the way in which each horse which was in your hands for sale was dealt with by you, and therefore the discovery relates to the matter in question between us. It appears to me, however, that for the purpose of resisting the production and discovery sought, the answer that there is this custom is not enough, and that the question of its existence is not one which it is necessary to determine now. Therefore the case must proceed, as far as possible without reference to this course of dealing.

W. Pearson:—Your Lordship will enter into whatever order you make the fact that these affidavits have been tendered.

HALL, V.C.:—Certainly; as I have said, I do not feel myself called upon to decide one way or the other whether they are admissible or not.

C. A. From this decision Mr. *Sheward* appealed. The appeal was heard on the 9th of June.

Argument. *W. Pearson*, Q.C., and *D. Jones*, for the Appellant:—

The 19th rule of Order XXXI. (1) has removed much of the

(1) Order XXXI, r. 19: "If the party from whom discovery of any kind or inspection is sought objects to the same or any part thereof, the Court or a Judge may, if satisfied that the right to the discovery or in-

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difficulty that was formerly felt in determining whether a party was entitled to discovery when the right to such discovery depended on an issue in dispute in the cause. In the present case our contention is that Mr. *Sheward* did not charge, and does not now claim, any commission on his sales and purchases, and if that be the case he was not the agent of the testator in such transactions; that is at present the issue between us, and till that is decided the Defendant can have no right to discovery as to the price at which he sold or bought the horses, or what were the views of his customers. The discovery is not material to the determination of that issue: *Wood* v. *Anglo-Italian Bank* (1). We have not only the affidavit of Mr. *Sheward* as to the course of dealing between them, but the evidence of several other horsedealers and of customers of the firm.

Methold, for the Defendant:—

I object to the reception of the evidence of the horsedealers and customers. Evidence of what other people do is not evidence of the contract in this particular case: *Hollingham* v. *Head* (2); *Howard* v. *Sheward* (3). It is not pretended that the course of dealing alleged by the claimant is a universal custom among horsedealers, only that those in a large way of business adopt it.

W. Pearson:—The Defendant's contention is that the course of dealing alleged is an unreasonable and incredible one. The evidence is admissible to prove that it is not so considered by others in the same trade.

JESSEL, M.R.:—We think the evidence is clearly admissible on the ground alleged.

JAMES and BAGGALLAY, L.JJ., concurred.

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spection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute in the action should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection."

(1) 34 L. T. (N.S.) 255.
(2) 4 C. B. (N.S.) 388.
(3) Law Rep. 2 C. P. 148.

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The evidence was then read.

Method (*Dickinson*, Q.C., with him), for the Defendant:—

Some instances may be shewn in which, according to our interpretation of the accounts, a commission was charged, and if all the entries were unsealed we believe that we could find more. It is impossible to tell the terms on which the business was carried on between the claimant and the testator without seeing the entries in the books. They are therefore material to this issue. Order XXXI., rule 19, gives the Court a discretion in ordering production, and this is a case in which it ought to be ordered, the case set up by the claimant being unreasonable and improbable. At all events the claimant ought to set forth the date of the various sales.

Judgment, C. A. Jessel, M.R. —

JESSEL, M.R., after reading Order XXXI., rule 19, continued:—

In the case before us a horsedealer brings in a claim of debt under a decree for the administration of the estate of a deceased customer. The executrix of the deceased customer says that the claim is ill-founded, that upon a balance of accounts being taken it will be found that nothing is due to the horsedealer, or much less than he claims; and in order to support that defence, it is said that the horsedealer has sold during the course of dealings extending over very many years many horses for the customer, that he has sold them as an agent for the customer, and that he has not credited the customer with the prices for which he sold them. The horsedealer says, I have not credited the customer with the prices at which I sold them, because I did not sell them on his behalf or on his account; the arrangement, in substance, was that I should pay him a certain price fixed between us for each horse, get no commission, and receive and retain whatever I got for the sale, which was the amount of profit made on the transaction, for my own benefit. That is the issue to be tried. The discovery sought is of the amounts received by the horsedealer on the sale of every horse, and that is the discovery which is objected to. The question we have to decide is this—first of all, has it any direct bearing on the issue to be tried? and in my opinion it has none. Once admit that the horsedealer made a profit over and above the sum for which he gave credit to the

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Judgment, C. A. Jessel, M.R.

customer, and you have everything admitted that is necessary to try the issue. But it may be, and very often is, upon questions of discovery, a point to be considered—Is the story so improbable that we ought to give the representative of the deceased customer a right to know the amounts with a view to at once giving credit for those amounts when the case comes to be decided, or is it so probable that the horsedealer is right that we ought to protect him from the discovery until after the issues are decided? That we must judge of with the evidence before us, and without intending to give anything which sounds like a final decision upon the controversy, I must say, having heard the evidence, that the probability in favour of the success of the horsedealer is at present very great, so great that I think, in the exercise of a sound discretion, we ought not to compel him to disclose what will then be his own private affairs until after the issue is decided against him, if it should ever be decided against him. Therefore I think we ought to act on the rule of Court which I have referred to, and refuse this discovery. The dates of the sales ought, however, to be given.

James, L.J.

JAMES, L.J.:—

I am of the same opinion. I think the 19th rule of Order XXXI. is one of the most wholesome rules introduced by the *Judicature Act* into practice, namely, that no discovery is to be taken from a Defendant unless it is really relevant to the issue first to be tried. In this particular case the issue is this: the executrix says, "You sold horses on commission." The claimant says, "I did not sell horses on commission, but bought them from you and sold them at a profit for myself." How can the actual prices obtained be relevant to that issue? It seems to me utterly impossible. It is admitted that a profit was made, and of course one can understand that some of the sales may have produced very large profit. I suppose horsedealers do make large profits, but it still comes to this, that the price actually given cannot be relevant to the issue. It could only be used for the purpose of raising a prejudice against the horsedealer.

Baggallay, L.J.

BAGGALLAY, L.J.:—

In this case Mr. *Sheward* has sworn most distinctly that in the

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course of his business he has never sold horses on commission, and that that is the usual course of trade with regard to horsedealers of high standing. He is supported by the affidavits of three horse-dealers of great repute, and the affidavits of six noblemen and gentlemen who are in the habit of dealing in horses to a large extent. In opposition to that evidence as it now stands there is no evidence of a contrary custom, but it is suggested that if this discovery is made, possibly something may be found on the face of Mr. *Sheward's* affidavit which may support the allegations made against him. It appears to me this is exactly the case for the application of the 19th rule of Order XXXI., and that, with the modification suggested of the dates of the sales being given, the order of the Vice-Chancellor should be discharged.

JESSEL, M.R.:—

We discharge the order, except that the claimant is to make discovery as to the dates of the sales of horses bought from Mr. *Leigh*. The costs of both parties both here and in the Court below will be costs in the cause.

Solicitors: *Allen & Son; Gregory, Rowcliffes, & Rawle.*

C. A. 1877 *June* 20, 21.

TAYLOR *v.* CORPORATION OF ST. HELENS.

Easement—Grant of Watercourses—Artificial Channel—Right to enlarge.

A landowner granted to a company all the watercourses, dams, and reservoirs upon certain lands of his, which watercourses, dams, and reservoirs were laid down upon the annexed plan, which was to be taken as part of the deed, and were thereon coloured blue, and also the several streams and springs of water flowing into or feeding the said watercourses, dams, and reservoirs, with right for the company solely to take and use the water from the said springs or streams of water, watercourses, dams, and reservoirs, with powers to cleanse and repair, and with all such other powers as should be requisite for enabling the company to enjoy the premises thereby granted. The grantor was to be at liberty to use the waste or overflow water from the dams or reservoirs of the company, but was not to exercise this power if the company resolved that its exercise would be injurious to them. The property coloured blue on the plan consisted of an artificial watercourse, partly covered and partly open, the dimensions of various parts of which were

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specified on the plan, and in some cases it was noted on the plan that they might be enlarged to a certain extent. Several springs and streams feeding the watercourse were marked on the plan. The watercourse, it appeared, was large enough to carry off all the water which flowed into it except after heavy rain, but at one point of its course underground there was a contraction of the channel which after heavy rain backed up the water and caused a considerable overflow over a weir, of which overflow the grantor for many years had the benefit. The grantees having occasion for more water proceeded to remove the above obstruction, so as to allow the whole of the water which came into the watercourse during heavy rains to run down into their reservoir:—

Held (affirming the decision of the Vice-Chancellor of the *Lancaster* Court), that the grant was a grant of the artificial channel, of the definite springs and streams on the land, and of such other water as should find its way into and run down the channel as it stood, and not a grant of all the water on the land, and that the grantees had no right to alter the levels of or enlarge the channel so as enable it to carry off all the water that ran into it in times of heavy rain.

Statement.

THIS was an appeal by the Defendants from a decree of the Vice-Chancellor of the *Lancaster* Court.

The *St. Helens Waterworks Company* were incorporated by an Act passed in the sixth year of the Queen, and empowered to purchase lands, springs, and streams, and also existing waterworks, pipes, or other works for the purposes of their Act.

By deed, dated the 28th of October, 1844, the Plaintiff *Taylor*, in consideration of a rent-charge to be paid to him, his heirs and assigns, by the company, granted and conveyed to the company, their successors and assigns, all and singular the watercourses, dams, and reservoirs, and intended reservoir, in or upon the lands of the Plaintiff in *Eccleston*, which watercourses, dams, reservoirs, and intended reservoir, were described and laid down in the plan annexed thereto, and were therein coloured blue, which plan was to form and be deemed a component part of the deed; and also the several springs or streams of water flowing into or feeding the said watercourses, dams, and reservoirs, as indicated on the said plan, together with the right and liberty to and for the company, their successors and assigns, solely to take and use the water from the said springs, or streams of water, watercourses, dams, reservoirs, and intended reservoir, for the purposes of the said company, and together also with full power and authority, right, and liberty to and for the company, their agents and workmen, and all other

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persons by them authorized, to enter into and upon the lands of *Taylor* mentioned in the plan, and to survey and take levels of the same, or any part thereof, and to set out or appropriate for the purposes of the said Act such parts thereof as were thereby conveyed, and in and upon such lands to bore, cut, dig, embank, trench, sough, and tunnel, and to remove or lay and use all soil, trees, gravel, or sand, or any other materials or things which might be dug or obtained thereon, and which might be necessary or proper for constructing, completing, maintaining, repairing, or using the same; and also from time to time to cleanse, open, and repair the said springs or streams of water, watercourses, dams, reservoirs, aqueducts, culverts, soughs, tunnels, and other works and premises as occasion might require; and for all or any of the purposes aforesaid to enter upon the lands immediately adjacent to the said springs or streams, watercourses, dams, reservoirs, aqueducts, culverts, soughs, tunnels, and other works and premises, the company, their successors and assigns, doing as little damage as might be thereby, and removing without unnecessary delay all sand, mud, gravel, stones, rubbish, or other materials and things which they might and were thereby authorized to throw and place, or cause to be thrown and placed, on such adjacent lands, and making a reasonable compensation for all damage (if any) which might be occasioned thereby; together with all such other powers, privileges, and authorities as should from time to time be deemed requisite for enabling the company, their successors and assigns, to have, use, occupy, possess, and enjoy the premises thereby conveyed, or intended so to be, fully and effectually according to the true intent and meaning of the Act; and together with all ways, rights, and appurtenances to the said premises belonging, and all the estate, right, title, and interest of *Taylor* in and to the same, and every part thereof, save and except and always reserved to *Taylor*, his heirs and assigns, all mines, beds, and veins of coal, cannel, and other minerals within or under the said springs or streams, watercourses, dams, reservoirs, aqueducts, and works, with the usual powers of getting and working the same (but subject to the restrictive covenant on his part hereinafter contained), to hold the said premises thereby conveyed, or intended so to be (except as aforesaid), to the company, their

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successors and assigns for ever, according to the true intent and meaning of the Act; they, the company, their successors and assigns, yielding and paying to *Taylor*, his heirs and assigns for ever, one clear yearly rent of £100 sterling by equal half-yearly portions, on the 1st day of January and the 1st day of July in every year, clear of taxes and all other deductions whatsoever (except as thereinafter expressly provided for). Then followed a covenant by *Taylor* not to work certain mines so as to injure the works. And it was by the deed-poll agreed and declared between and by the said company and the Plaintiff *Samuel Taylor* that *Taylor*, his heirs and assigns, should have the power and privilege of taking and using for the irrigation of his land the waste or overflow water from the dams or reservoirs of the company without paying any rent or other compensation for the same, but only at such times as and when the said waste or overflow water should be useless to the company, and not so as on any occasion to prejudice or diminish the quantity of water flowing, or which otherwise would or might flow to the pipes of the company, but such power or privilege was not at any time to be exercised by *Taylor*, his heirs or assigns, when in the opinion of the company declared at any general or extraordinary meeting thereof such use as aforesaid by him or them should or might be injurious to the company.

The principal part of what was marked blue on the plan was a long narrow strip of apparently uniform width, beginning at the boundary of Mr. *Taylor's* property, and inclosed partly between continuous lines and partly between dotted lines, the dotted lines indicating the work being underground. The successive parts of this strip, beginning from the higher end, had descriptions written against them in the plan as follows: 1. A short piece, "culvert." 2. "Large tile drain." 3. "Intended open drain." 4. "Intended covered drain, 2 ft. by 18 in." 5. "Intended open drain, 3 ft. wide at bottom." 6. "Covered drain, 18 in. by 12 in.; power to make it 2 ft. square." 7. "Open." 8. "Covered drain, 18 in. by 12 in., power to make it 2 ft. square." 9. "Open drain, 3 ft. wide at bottom." This opened into a pond marked "Spring pits," which was coloured blue. Next came a wider strip similarly coloured, marked "Canal, 12 ft. wide at present; surface of water 1 ft. 6 in. above waste weir of *Paddock Dam*." Next came a

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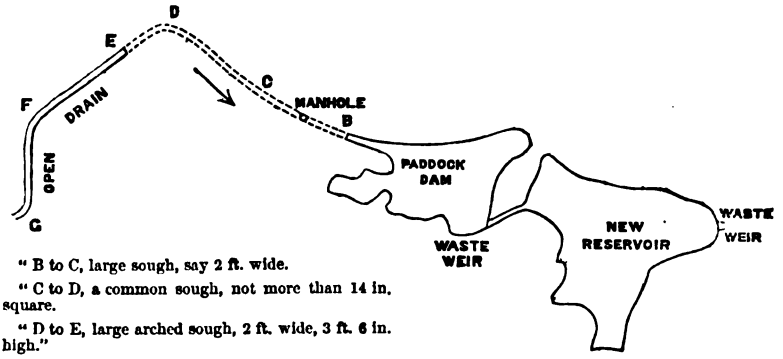
Statement.

narrow strip marked "open drain." This ended at a point marked E on the plan. A rough copy of the remainder of the plan is given, with the notes at the foot of the plan.



"B to C, large sough, say 2 ft. wide.

"C to D, a common sough, not more than 14 in. square.

"D to E, large arched sough, 2 ft. wide, 3 ft. 6 in. high."

Two springs were indicated on the plan, which flowed into the watercourse, and here were also two small brooks delineated as crossing it.

The corporation of *St. Helens* had acquired an interest in the waterworks under an Act of Parliament entitling them to purchase them.

The watercourse was for the most part supplied by springs, but after heavy rain a quantity of surface water came down which the watercourse was insufficient to carry off; and *Taylor*, many years before this action, but at what time it did not appear, made three weirs, with channels running in a northerly direction, to carry off such surplus water, which was conducted into a dam or reservoir belonging to him.

Several alterations were at different times made in the watercourse with *Taylor's* consent. One of these alterations consisted in converting the open drain, E G, into a covered channel about two feet square. At the point E there was a vertical drop of about 3 ft. 6 in. in the bottom level of the culvert. The bottom then ran nearly level to a point called the *Throttle*, about half way between the point C and the manhole shewn on the plan, where it rose suddenly 28 inches, and continued at this higher level for about 40 feet, and then fell rapidly down to the outlet into the *Paddock Dam*, which it entered at a point nearly on a level with the foot of the rise of 28 inches. The roof of the culvert was

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also depressed at the *Throttle;* and the effect of this fall in the roof and rise in the bed was to oppose a considerable obstruction to the flow of water, which in heavy rains was backed up, and so caused to flow by the weirs and channels above mentioned into *Taylor's* reservoir. It did not appear that the existence of the *Throttle* was known in 1844.

The Defendants, in 1875, opened the watercourse and commenced substituting for the portion between the point F and the *Paddock Dam* a culvert, the bottom of which had a uniform gradient from F to the *Paddock Dam*, the effect of which would have been to enable the watercourse to carry into the *Paddock Dam* in rainy weather a much greater amount of water than the *Throttle* formerly allowed to pass. *Taylor* and the *London and North Western Railway Company*, who were lessees of reservoirs of his into which the surface water that escaped over the weirs flowed, thereupon filed their bill to restrain the corporation and the waterworks company from carrying out their alterations and from altering the watercourse so as to cause an encroachment on *Taylor's* land, or a diminution in the overflow at the weirs, and to compel the Defendants to restore the watercourse to its original state.

Vice-Chancellor *Little* made a decree restraining the Defendants from continuing their alterations, and from removing the *Throttle*, and from otherwise enlarging the size or altering the levels of the watercourse between the point E and *Paddock Dam* as they existed immediately before the alterations of 1875, and from otherwise encroaching on the soil of the Plaintiff *Taylor* in or through which that part of the watercourse was constructed, and from thereby causing any diminution or abatement of the overflow of water received by the Plaintiffs by means of the *Broom Covert* and other weirs. The decree went on to order the corporation to reconstruct and replace the *Throttle* and restore the aforesaid part of the watercourse between E and *Paddock Dam* to the state in which it was before the alterations of 1875. A similar injunction was granted against altering another part of the watercourse, and it was provided that nothing in the decree should entitle the Plaintiffs to withdraw any water from the watercourse by means of their weirs, except any such excess of water at any time flowing down

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the watercourse as should by reason of such excess be incapable of passing forward through the lower portions of the watercourse into *Paddock Dam*, or any water by the withdrawal whereof the surface of the water in the part of the watercourse between the letters H and G, should be reduced below the height of 18 inches above the height of the waste weir of *Paddock Dam*.

The Defendants appealed.

Cotton, Q.C., and *Christie*, for the corporation of *St. Helens*.

E. S. Ford, for the waterworks company.

Robinson, Q.C., and *Maberly*, for the Plaintiffs.

The nature of the arguments will sufficiently be seen from the judgments.

Judgment, Jessel, M.R.

JESSEL, M.R.:—

The question, as it appears to me, which the Court has to decide, is what is the true construction of the deed of grant dated on the 28th of October, 1844, and executed by Mr. *Samuel Taylor*, the Plaintiff, to the Defendants, the *St. Helens Waterworks Company*. I think that the true rule of construction is to construe the language of the instrument according to its ordinary meaning, giving to technical terms their technical meaning, unless we find a context such as to convince the mind that the ordinary rules of construction which would be applied to the original expressions standing alone ought not to be applied.

Now, that being so, let us consider what is granted by this deed. Before doing so I will take the liberty of making an observation as regards a maxim quoted by Mr. *Christie*, and which is to be found, I believe, in a great many text-books, and, I am afraid, also in a great many judgments of ancient date, and that is, that a grant, if there is any difficulty or obscurity as to its meaning, is to be read most strongly against the grantor. I do not see how, according to the now established rules of construction as settled by the House of Lords in the well-known case of *Grey* v. *Pearson* (1), followed by *Roddy* v. *Fitzgerald* (2) and *Abbott* v. *Middle-*

(1) 6 H. L. C. 61. (2) 6 H. L. C. 823.

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ton (1), that maxim can be considered as having any force at the present day. The rule is to find out the meaning of the instrument according to the ordinary and proper rules of construction. If we can thus find out its meaning, we do not want the maxim. If, on the other hand, we cannot find out its meaning, then the instrument is void for uncertainty, and in that case it may be said that the instrument is construed in favour of the grantor, for the grant is annulled.

I come now to the words of the grant. It is a grant of "all and singular the watercourses, dams, and reservoirs, and intended reservoir, in or upon the lands of the said *S. Taylor*, which watercourses, dams, reservoirs, and intended reservoir, are described and laid down in the plan annexed to these presents, and are therein coloured blue, which plan is to form and become a component part of these presents, which are accordingly impressed with a stamp adequate to include such plan." I do not read the next following words for a moment, for a reason which I will explain. Of course, if this document had been drawn up by a lawyer, with the subsequent knowledge that has been acquired, it would have been differently expressed, and indeed we should not have had this long argument and these many difficulties. But still I think the words strictly read have a definite technical meaning, and convey not an ambiguous sense, but one sense and one sense only. This is a grant of a watercourse. I leave out the dams and reservoirs for the present purpose. A grant of a watercourse in law, especially when coupled with other words, may mean any one of three things. It may mean the easement or the right to the running of water, it may mean the channel-pipe or drain which contains the water, and it may mean the land over which the water flows. Which it does mean must be shewn by the context, and if there is no context I apprehend that it would not mean anything but the easement, a right to the flow of the water.

Now, for reasons which I shall give presently, I think that in this case the word watercourse means a corporeal hereditament, and not merely an easement or right to the running of water, and that it bears the second meaning, that is, the channel through which the water runs, the pipe or drain which, so to say, contains

(1) 7 H. L. C. 68.

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the water. In the present case the channel is an artificial channel made by man, and there was at the time of the grant an actual existing pipe or drain, in some parts covered over and in other parts open. In my opinion, from the context, the word "watercourse" in this document means that, and nothing else. Then what is conveyed by the word "watercourse"? I think that it conveys not merely the pipe or drain, but also the water in it, and that, consequently, if we found nothing else in the deed, we ought to hold that the grantee was entitled to the property of the channel, and to the right to take the water which got into that channel by lawful means.

I now come to the next words: "And also the several springs or streams of water flowing into or feeding the said watercourses, dams, and reservoirs, as indicated on the said plan." Now what is granted there? We find indicated on the plan two springs and two streams of water. But, besides that, from the drawing on the plan it is obvious that there must be some source of supply outside the plan, and not on Mr. *Taylor's* land, water from which fed, or flowed into, the watercourse in question. So that we have streams and springs of water on Mr. *Taylor's* land, and we also have some water flowing into the watercourse from some springs or streams off Mr. *Taylor's* land, which springs or streams were not his, and which he could not grant. What, therefore, must we impute to him the intention to do by this second grant? Clearly not to grant that which he had not, the streams and springs which did not belong to him. So far as any water flowed into the channel from those streams or springs he had granted the right to that by the grant of the watercourse, and no additional words were wanted for that purpose. He must be taken to have granted his own springs or streams of water as something in addition to the watercourse, because if a man grants the watercourse with the water in it, it does not follow that he grants the whole of the water in the other springs or streams on his estate, or that he deprives himself of the right to take water from those springs or streams.

Now what are springs and streams? A spring of water, both in law and ordinary language, is, as I understand it, a definite source of water. When we talk of a spring of water we mean a

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source of water of a definite or nearly definite area, the word "spring" coming from the water springing or bubbling up. It may be an underground spring which supplies a well, and we say that water "wells up." It may be the ordinary spring from which a small stream or rivulet runs above the ground. But those are definite things. A spring of water means a natural source of water of a definite and well-marked extent. So that there being springs of water on the land to which this would refer, it appears to me he grants those springs. Then as regards streams of water, that again is a technical term. A stream of water, in law, is water which runs in a defined course, so as to be capable of diversion; and it has been held that the term does not include the percolation of water below ground. There were streams of water on this property, streams delineated on the plan, and I see no reason for extending the meaning of the term. The Plaintiff *Taylor*, in addition to the water which may have found its way from sources beyond his estate, or even by percolation from his estate into the watercourse, grants to the company the springs or streams of water which flow into or feed the watercourse. That is the extent of the grant.

Now, what is claimed by the Defendants is this. They say that the grant includes not merely the water which would pass under the word "watercourse," and not merely the definite springs or streams of water on Mr. *Taylor's* estate, but all that water which can by any possibility find its way from Mr. *Taylor's* land into the watercourse. Now I agree that whatever gets into the watercourse passes under the word "watercourse," but passes in no other way. It is not an independent grant of the water, but it is a grant of the water, because a grant of the watercourse includes the water which gets into the watercourse. That may seem at first sight a distinction without a difference, but it is not so. If you grant a containing vessel with the fluid within it, you grant the right to any fluid which may be put in it, with the right of getting it out, but the grant does not include a right of enlarging the vessel so as to make it hold a larger quantity of fluid in order to enable the grantee to take more out of it.

Then the deed goes on, "together with the right and liberty to and for the company and their successors and assigns solely to

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take and use the water from the said springs or streams of water, watercourses, dams, reservoirs, and intended reservoir for the purposes of the said company." That is an exclusive grant, not a grant in common. But it includes only the same subject, the water has already been granted, and now the grant is made an exclusive grant. "Together also with full power and authority, right and liberty, to and for the said company, their agents and workmen, and all other persons by them authorized, to enter into and upon the lands of the said *Samuel Taylor* mentioned and described or referred to in the said plan, and to survey and take levels of the same or of any part thereof, and to set out or appropriate for the purposes of the said Act such parts thereof as are hereby conveyed." Now, in one sense, of course, there are no lands granted, there is no grant of land from the centre of the earth to its surface. But the word "land" is a term of very large import, and if I am right in the construction I put on the word "watercourse," there are lands granted, that is, there is a grant of that horizontal layer of land which includes the watercourse, and this is enough to satisfy these words. "And in or upon such lands to bore, cut, dig, embank, trench, sough, and tunnel, and to remove or lay all soil, trees, gravel, or sand, or any other materials, &c., which may be necessary or proper for constructing, completing, maintaining, repairing, or using the same, and also from time to time cleanse, open, and repair the said springs or streams of water, watercourses, &c., as occasion may require." Those words "cleanse, open, and repair springs or streams of water," obviously refer to definite springs or streams, for you could not cleanse, open, and repair small streams percolating under the earth, or little driblets of water that run down after an ordinary shower, "and for all or every of the purposes aforesaid to enter upon the lands immediately adjacent to the said lands or streams, watercourses, &c., doing as little damage as may be possible, and removing without unnecessary delay," and so on. It does not appear to me that either of those powers at all enlarges the grant. They merely include that which is necessary for the using the thing granted, and for keeping the thing granted in good repair. Then come these words, "together with all such other powers, privileges, and authorities as shall from time to time be deemed requisite for

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enabling the said company, their successors and assigns, to have, use, occupy, possess, and enjoy the premises hereby conveyed, or intended so to be, fully and effectually according to the true intent and meaning of the said Act." Those words do not give them anything more than the premises hereby conveyed and intended so to be. I agree that if it had been shewn that the whole of the water which arises in or falls upon the Plaintiff's land was granted separately and independently, and not merely as an incident of the watercourse, and then we found these powers to get it (powers which, indeed, I should imagine would be annexed by law, for if you grant a man a thing you grant him reasonable ways of getting it), and it could not be got except by enlarging the watercourse, then the Defendants would have had under these words and as an incident to the grant the right to enlarge the watercourse, because they could not get the thing granted without doing so. But that assumes that the whole water is granted, and, as I said before, I do not consider it to be granted, but merely so much water as gets into the existing watercourse, which of course does not carry the power of enlargement.

Then there come other words which were relied on. There is a reservation of mines under the said springs or streams, watercourses, dams, reservoirs, aqueducts, and works. Now, in the first place, that reservation, which was pressed upon us so strongly in favour of the argument of the Defendants, has, in my mind, acted the other way, and for this reason:—You could not speak of mines under springs or streams if you meant little driblets of water which percolate through the surface after a shower. The reservation shews that the meaning which I have attributed to "streams and springs" was the meaning of the parties preparing this document, for speaking of mines under them shews that they were things having a distinct locality. Then it is said that the mere fact of reserving the mines shews that land is granted. I do not attach much weight to that argument, even as a general rule, because sometimes these reservations are put in *ex abundanti cautelâ*, especially when we have these words, "with the usual power of getting and working the same." But in this particular instance there was a reason for putting in the word "mines" quite independently of the question whether lands were granted

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or not, because even assuming that an easement was granted, the getting the mines might have interfered with the grant of the easement. It is the usual power of getting and working the same subject to the restrictive covenant herein contained. And I take it, when you come to look at the covenants, you find the restrictive covenant prevents Mr. *Taylor* interfering with a certain portion of the mines; in other words, he has a right to get the mines in the usual course of working, although he may thereby interfere with that part of the works of the company to which the restrictive covenant does not extend. There is, therefore, a special reason for inserting this exception, which gives a pointed meaning to it, and which prevents our saying that it can have the effect of controlling the words of the grant.

I believe I have now considered the whole of the arguments addressed to us on the part of the Appellants, with the exception of that founded on the clause giving Mr. *Taylor* the power and privilege of taking and using, for irrigation of his land, the waste or overflow water, but not so as to prejudice or diminish the quantity of water which would flow, or might otherwise flow, to the pipes of the company, which privilege was not to be exercised if the company declared that in their opinion its exercise would be injurious to them. This, it is said, makes *Taylor's* right to the overflow permissive only. But what was the permission? It was to take the water from the dams or reservoirs. He neither asked, nor wished to have, permission to drain his own lands. Nobody dreamt of such a thing on either side. He could not, of course, take away the streams or springs he had granted, but there is an extra benefit granted to him of taking water out of the dams or reservoirs, and it seems to me that without this special leave it it would have been a mere trespass. Having once granted a dam or reservoir, he had no right to enter on it or take a cup of water out of it. This does not, it appears to me, throw any light upon the proper construction of the grant. For the reasons I have given, I think the grant was restricted to a grant of the water-course in its actual state, and to such water, not being water in the defined streams or springs, as could be conveyed by the water-course, and therefore the company and their successors, the corporation of *St. Helens*, have no right to alter the existing watercourse

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in the way they have done, and consequently the judgment of the Vice-Chancellor is right and ought to be affirmed.

JAMES, L.J.:—

I am also of opinion that the judgment of the Vice-Chancellor ought to be affirmed. The grant in this case is of "all and singular the watercourses described and laid down in the plan annexed to these presents and thereon coloured blue, which plan is to form and become a component part of these presents." Therefore it is a grant of something that was actually delineated on the plan. There was a watercourse delineated on the plan and coloured blue; and I am of opinion that nothing was conveyed by those words, except that thing that was so delineated and so coloured blue upon the plan. Of course it is open to the parties to say that the word "watercourse" means that piece of the surface of the land which is there delineated, and with its usual results of giving to the owner of that strip of land the right to the column of air above, and the right to the column of earth and rock below. But I am of opinion that the word "watercourse" has no such meaning. The word "watercourse" has no definite meaning in the English law as a description of a corporeal tenement. "Watercourse," in its natural and ordinary meaning, is, as it implies, the course of water, and a grant of a course of water would be a grant of an easement, and not a grant of a corporeal tenement. But I agree with what the Master of the Rolls has said, that we must put a reasonable meaning upon these words; and, in truth, when you are dealing with such a word as the word "watercourse," you are dealing with it as you would with a sewer, or a drain, or anything of the kind, and the word "watercourse" may mean not only the flowing of the water in its ordinary course, but the corporeal thing through which that water flows. In the present case I am of opinion that "watercourse" means the thing through which the water flows, just as if there had been a pipe or made culvert on the ground, and there was a grant of the barrel of the drain-pipe or culvert, and that this, in point of law, amounts to nothing more than a grant of that specific portion of the Plaintiff's land which was then in existence for the purpose of the passage of water.

That being so, where do the Defendants get any right to alter

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or enlarge the watercourse, laterally or vertically? I can see no right to alter it, or to make a new one, or to enlarge it. If they have a right to alter it, they would have a right to make a new one, and in that case it appears to me they might have exactly the same right to go and make one in an entirely new course. I do not find in the grant any such power.

Then it is said that there is a grant of the springs or streams of water. It is not a grant of all springs and streams on the land, but of springs or streams of water flowing into this watercourse, which I read to be all water that flows into the watercourse by means of springs or streams, as delineated on the plan, something having a definite existence as a spring or stream, which we all know means something that you can see and point out on the ground. Then the only other words are to enter on the land for the purpose of setting out and appropriating "such parts thereof as are hereby conveyed or intended so to be, and in or upon such land to bore, cut, dig, embank, entrench, sough, and tunnel, and to remove or lay all soil, trees, gravel, or sand, or any other materials or things which may be dug or obtained thereon, or which may be necessary or proper for constructing, completing, maintaining, repairing, or using the same." Then come these words: "and also from time to time to cleanse, open, and repair," and so on. The acts authorized to be done are acts necessary for constructing, completing, and afterwards maintaining, repairing, and using. But I am of opinion that when there are powers of this kind given to enter upon another man's soil, whether given by Act of Parliament or contract, in order to construct or complete works, these powers are to be exercised once for all, and that when the works have once been constructed and completed, the grantees are not at liberty a quarter of a century, or half a century, or a century afterwards, to say, "The works are not so large as we should like, and we want to alter them." That was the point in issue in *Blakemore* v. *Glamorganshire Canal Navigation* (1). There the power was under an Act of Parliament, which was dealt with by the Lord Chancellor as being a contract between all the parties interested, and he laid down in so many words that it was to be exercised once and for all. I am of opinion that the

(1) 1 My. & K. 154.

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Defendants have no power to enlarge the watercourse under those words.

Then there are the other words to which the Master of the Rolls has referred, "together with all such other powers, privileges, and authorities as shall from time to time be deemed requisite for enabling the company, their successors and assigns, to have, use, and occupy the premises." That means powers, privileges, and authorities other than those particularly mentioned, and refers to the sort of subsidiary privileges which are necessary to the grantee in such cases, as, for instance, an entrance for horses, carts, and carriages, and so on, for the purpose of bringing materials and taking away the stuff which he has cleansed out. Those general words cannot enlarge the thing granted, since they are merely powers, privileges, and authorities to enjoy that which was granted. I am of opinion, therefore, without going further through the deed, that the Vice-Chancellor was quite right in the conclusion at which he arrived, and that the form of the injunction was also right.

BRAMWELL, L.J.:— Bramwell, L.J.

I am of the same opinion, and I do not know that I have anything new to say. But I should like to state how the case presents itself to my mind.

The grant was of all and singular the watercourses in and upon the land. I do not refer to the other words. The watercourse was an artificial one, and to my mind the grant of all and singular the watercourses was pretty much the same as though the grant had said "watercourses, waterways, culverts, soughs, and pipes," and so on. It was a grant of the artificial thing, and the space in the soil which it occupied. I think if the case stood there alone it would be impossible to say that the grantee had any right to alter this artificial thing and make it different to what it was, or that he could have taken the pipe down and put one there of double its diameter.

But what created a doubt in my mind for some time was this, that there is a specific grant of all the streams and springs of water. Now I take it that is, as the Lord Justice has said, a grant not so much of the very spring itself as of a right to the water

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Judgment, Bramwell, L.J.

which comes from the spring, and what occurred to me was this, that if the artificial watercourse was not sufficient to enable the grantee to have all the water from the springs and streams, then, under the rule by which, if anything is granted, the grantee has a right to do that which is necessary to enable him to enjoy the thing granted, there might be a question whether he would not be at liberty to enlarge the artificial watercourse. If it were necessary to express an opinion upon it, I think that he is only entitled to so much of the water from the springs and streams as he can get by means of the artificial watercourse, and that the word "solely" only means that the grantor may not interfere with that enjoyment. I think so, because the words of the plan, which clearly are to be read as being in the deed, shew that the artificial thing is granted with certain limited powers of alteration. But it turns out on inquiry that that question does not arise, because, upon the evidence, as I take it, the artificial watercourse is sufficient for the passage of the natural springs and streams of water granted, and consequently it is not necessary for the grantees to enlarge the watercourse for the purpose of obtaining those springs and streams.

Then, as has been pointed out by the Master of the Rolls, what the Defendants wanted to do was to enlarge this artificial watercourse, not for the purpose of enjoying that which is granted to them, but for the purpose of enjoying that which indeed does after a certain fashion come to them, but which it would be perfectly in the power of the grantor to intercept if he thought fit, by drawing the water in a different direction. I cannot think that there is any pretence for claiming that right—a right to enlarge the watercourse, in order that they may enjoy something which is not granted.

Then an argument was founded on the limited power of alteration given on the plan. With regard to that, it is to be borne in mind that both parties evidently contemplated that there should be an overflow at certain times. The grantee of the watercourse is under no obligation to carry off all the water that comes down, and prevent its flooding the land of the grantor. On the contrary, he is at liberty to allow this land to be flooded, and the grantor receives the benefit from that flood without paying for it.

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I am of opinion, therefore, there was no right to alter or to enlarge this watercourse beyond what is provided for by the plan, and further, I desire to express, with the Lord Justice, my concurrence in the argument of Mr. *Robinson*, that if there was any power to do so, it ought to have been done once and for all. I cannot understand that the Defendants had a right to come every five years and make an addition to the size of the channel, if they thought they had not made it large enough for their purposes. I am of opinion that this decree was perfectly right.

Solicitors: *Gregory, Rowcliffes, & Rawle; Byrne & Lucas.*

In re HOSKIN'S TRUSTS.

C. A. 1877 June 25.

Appeal for Costs — Trustees — Judicature Act, 1873, *s.* 49 — *Rules of Court*, 1875, *Order* LV. — *Right of Executor of Donee of General Power of Appointment to receive the appointed Fund.*

A married woman having, under a settlement, a general power of appointment by will over a fund of personal estate, made a will directing that the fund should be divided among five persons, and appointed executors. The trustees of the settlement paid the fund into Court under the *Trustees Relief Act*, and the *cestuis que trust* presented a petition for payment out, and established their title by evidence. *Malins*, V.C., ordered payment of the fund to the Petitioners, but directed the trustees to pay the costs of the petition (except the costs of the evidence of title), on the ground that they ought to have paid the fund to the executor to be distributed. The trustees appealed from so much of this order as directed them to pay costs:—

Held, that the case was governed by *Taylor* v. *Dowlen* (1), and that an appeal would not lie.

Per Jessel, M.R., and *James*, L.J.: The law is now settled that where a *feme covert* or other donee of a general power of appointment over a fund of personalty makes an appointment of the fund by will and appoints an executor, the executor is entitled to receive the appointed fund.

Statement.

THIS was an appeal by the trustees of Mr. and Mrs. *Hoskin's* settlement from so much of an order of Vice-Chancellor *Malins* as directed them to pay the costs of the petition, with certain exceptions. The case below is reported (2).

The case was partially opened on the 22nd of June, before *Jessel*, M.R., and *James* and *Bramwell*, L.JJ. Upon its being

(1) Law Rep. 4 Ch. 697. (2) 5 Ch. D. 229, where the facts will be found.

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C. A. 1877 — *In re* HOSKIN'S TRUSTS. — Argument.

opened, *Jessel*, M.R., said that he considered the law to be settled in accordance with *Re Philbrick's Trusts* (1).

June 25. Upon the case coming on again,

Bristowe, Q.C., took the preliminary objection that this was an appeal for costs.

Yate Lee, for the Appellants:—

I say, first, that a trustee stands in a different position from other parties as to appealing for costs. He has a *primâ facie* right to costs out of the fund, and it has been laid down from an early period that he can appeal from the refusal of them: *Owen* v. *Griffith* (2); *Angell* v. *Davis* (3); *Menzies* v. *Connor* (4); *Legg* v. *Mackrell* (5). *Taylor* v. *Dowlen* (6) appears to go the other way, but unless referable to special grounds it is overruled by *Cotterell* v. *Stratton* (7). A case under the *Trustee Relief Act* is on the same footing as in a suit: *Re Woodburn* (8). This right of a trustee is saved by the *Judicature Act*, 1873, s. 49, and Rules of Court, 1875, Order LV. *Witt* v. *Corcoran* (9) is also a case where an appeal for costs was allowed.

[BAGGALLAY, L.J.:—The question there turned solely on whether there had been a contempt or not, which is not a question of discretion.]

Just so here. The decision went solely on the ground that Mrs. *Hoskin's* executor was the proper person to receive the money, and that is not a question of discretion. That brings me to the second point, that this is a pure question of principle, not of discretion. If it is to be held that an appeal will not lie here because it is a question of costs, the result will be that if a Judge below holds, however erroneously, that the fund might have been paid over to some person who could have distributed it, and on that ground fixes the trustee with costs, he is without remedy. Thirdly, the fund was paid into Court with the written consent of the person whom the Vice-Chancellor held entitled to receive it.

(1) 13 W. R. 570.
(2) 1 Ves. Sen. 250; Amb. 520.
(3) 4 My. & Cr. 360.
(4) 3 Mac. & G. 648.
(5) 2 D. F. & J. 551.
(6) Law Rep. 4 Ch. 697.
(7) Ibid. 8 Ch. 295.
(8) 1 De G. & J. 333.
(9) 2 Ch. D. 69.

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Bristowe, Q.C., and *Bardswell*, for the Petitioners, were not called upon.

JAMES, L.J.:—

Judgment, James, L.J.

It is settled by *Taylor* v. *Dowlen* (1), which is a decision precisely in point, and has never been disputed or overruled, that a case where a trustee has been deprived of costs for impropriety of conduct is no exception from the general rule that an appeal for costs alone will not lie. This rule was adopted by the Legislature in the *Judicature Act* of 1873, with an exception of cases where a trustee or mortgagee is entitled to costs out of a particular estate or fund. The present is not a case where the Appellant is *ex debito justitiæ* entitled to costs; the costs of a trustee being subject to the discretion of the Court.

I may add that if the merits had to be gone into, I should hold it to be established beyond all question that where a *feme covert*, or any other person having a general power of appointment over a fund of personalty, makes an appointment of the fund by will and appoints an executor, the executor, when he has proved the will, is entitled to receive the appointed fund.

BAGGALLAY, L.J.:—

Baggallay, L.J.

I am of opinion that this case is governed by *Taylor* v. *Dowlen*, and that the other authorities which have been referred to are clearly distinguishable from it.

BRETT, L.J.:—

Brett, L.J.

If this had been a case in which an appeal would lie before the *Judicature Act*, I think that the Act would have prevented an appeal. But the case, apart from the Act, is governed by *Taylor* v. *Dowlen*. It is said that that decision has been overruled; but how can it have been overruled? No Court but the House of Lords had jurisdiction to overrule it, and it is not alleged that the House of Lords has done so.

Solicitors: *Burton, Yeates, & Hart; Brownlow; Meredith, Roberts, & Mills.*

(1) Law Rep. 4 Ch. 697.

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M. R.
March 15, 20, 22.
C. A.
June 26.

CORPORATION OF BIRMINGHAM *v.* ALLEN.

[1876 B. 77.]

Support of Surface—Adjacent Land—Colliery—Excavation of Coal by Owners of Land not adjoining.

Between the land of the Plaintiffs and that of the Defendants, who were owners of a colliery, there was an intermediate piece of land, the coal under which had been worked out some years before by a third party. The effect of the cavity in the intermediate land was, that when the Defendants worked the coal under their land, subsidence was caused in the surface of the Plaintiffs' land. It was admitted that if the intermediate land had been in its natural state no injury would have been caused to the Plaintiffs by the Defendants' workings:—

Held (affirming the decision of the Master of the Rolls), that the Plaintiffs had no right of action against the Defendants.

The support to which a landowner is entitled from the adjacent land is confined to such an extent of adjacent land as in its natural undisturbed state was sufficient to afford the requisite support.

Statement.

THIS was an action by the Corporation of *Birmingham*, who were the owners of gasworks called the *Swan Village Gasworks*, to restrain the Defendants, *T. H. Allen* and *T. E. Holden*, who were proprietors of *Swan Farm Colliery*, in the neighbourhood of the gasworks, from working their coal in such a manner as to cause subsidence of the surface of the Plaintiffs' land.

The Plaintiffs purchased the gasworks from the *Birmingham and Staffordshire Gaslight Company* in the year 1875.

The gas company purchased the land on which the works were erected, together with the minerals under the same, in the year 1824. They afterwards purchased the minerals under various pieces of land adjoining their property, for the purpose of preventing the surface of their own land from being shaken or disturbed. Among others they purchased, in 1872, the minerals under a piece of land belonging to Messrs. *Pershore & Gregory* which adjoined the western boundary of the gasworks. The Defendants' colliery lay to the west of this piece of land, to which it adjoined, so that the piece of land lay between the properties of the Plaintiffs and the Defendants.

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The seams of coal under the district were as follows:—The *Brooch Coal*, 3 ft. 9 in. thick, about ninety yards from the surface.

The *Thick Coal*, 28 ft. 9 in. thick, about 156 yards from the surface.

The *Heathen Coal*, 3 ft. 6 in. thick, about 156 yards from the surface.

The *New Mine Coal*, 5 ft. 6 in. thick, about 185 yards from the surface.

The *Thick Coal* under the piece of land purchased by the gas company in 1872 had been worked out more than thirty years before they purchased it, and the superincumbent earth was propped by pillars in the usual way.

The *Thick Coal* under the gasworks had not been worked out when the company purchased the site in 1824; but in the year 1834 they granted the *Thick Coal* under a small portion of the surface to Messrs. *Bagnall & Haynes*, who worked it out. Some of the area thus granted was exactly under the retorts of the gas company.

The Defendants were now engaged in working the lowest vein, or *New Mine Coal*, under their land. They worked from west to east, and in doing so approached within a few yards of the western boundary of land purchased by the gas company in 1872.

The Plaintiffs claimed that the working of the *New Mine Coal* by the Defendants had already caused a subsidence of the surface of their land and the buildings thereon erected, and would, if persisted in, cause them great injury, and they brought this action for an injunction accordingly.

The Defendants pleaded that if any subsidence of the Plaintiffs' land had taken place, it had been caused partly by the excavations of *Thick Coal* under the Plaintiffs' own land by the lessees of the gas company, and partly by the erection of buildings within the last twenty years over such excavated portions; and they denied that they were under any liability to the Plaintiffs in respect of any injury they had sustained.

Both sides went into evidence at great length. The trial came on before the Master of the Rolls on the 15th of March, 1877, and witnesses were examined on both sides.

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CORPORATION OF BIRMINGHAM v. ALLEN.

The result of the evidence is stated in the judgment of the Master of the Rolls.

Chitty, Q.C., and *Beale*, for the Plaintiffs.

Southgate, Q.C., *Ince*, Q.C., and *Speed*, for the Defendants.

Judgment, M.R. JESSEL, M.R. :—

I am of opinion that the Plaintiffs' case entirely fails. We have had a most careful and, I think, a most exhaustive investigation into the facts, and, as far as I am concerned, I have no doubt upon any of the facts necessary to be decided.

I think it is plain that if the land adjoining the Plaintiffs' land had not been undermined, the Defendants might work the *New Mine* seam as well as the *Thick Coal* seam up to their boundary. [His Lordship then referred to the evidence on this point.]

Now, looking to this evidence, and considering that it is for the Plaintiffs to prove their case, I am of opinion that it is proved satisfactorily that, supposing the land between the Plaintiffs' and the Defendants' land had remained in its natural state, if the Defendants' workings should be prosecuted up to the boundary of their property, they would not, as far as the *New Mine* is concerned, cause any injury whatever to the Plaintiffs' works.

Then there is a second question, which is a question of fact I think I ought to give my opinion upon. Has the working of the Defendants' *New Mine* at all actually injured the Plaintiffs' buildings? I am clear it has not. [His Lordship then considered the evidence on this part of the case, and considered that there was no evidence of injury already received.]

Then comes the question, Will it occasion injury? As to that, the evidence is very conflicting. Mr. *Cooksey* puts the safe distance as 100 yards, and although there is a little variation, the Plaintiffs' experts substantially agree in putting the safe distance at 100 yards, or fifty-five yards from the Defendants' boundary. The Defendants' four experts also substantially agree, and they put it at sixty yards, or fifteen yards from the Defendants' boundary.

Here, again, it is for the Plaintiffs to make out their case, and it

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seems to me to be mere surmise on both sides. However, I must say, if it were necessary to decide the case on that ground, that it is not proved to my satisfaction that more than sixty yards is required, that is, more than fifteen yards from the boundary.

[His Lordship, after considering certain subordinate questions of fact, continued :—]

I now come to a point of very great difficulty indeed, on which the evidence is in a very singular condition. The Plaintiffs themselves, or their predecessors in title, had allowed a portion of their land to be undermined, that is, had allowed coal to be extracted from under that land, and the question was, whether the extraction of that coal in any way interfered with the support of the retort houses. Now the odd part of the matter is, that the experts for the Plaintiffs said that it would interfere with the support, and increase subsidence; and the experts of the Defendants said it would not. Under these circumstances, I think it is only fair to say that, as against the Plaintiffs, they cannot reject the evidence of their own experts, and therefore I must consider that it does affect it to some extent, but, considering the evidence of the Defendants' experts, not to a material extent. That is the way that matter appears to me.

Now, having so far dealt with the facts, let me consider the law. As I understand, the law was settled by the House of Lords, confirming the decision of the Court of Exchequer Chamber in the case of *Backhouse* v. *Bonomi* (1), that every landowner in the kingdom has a right to the support of his land in its natural state. It is not an easement: it is a right of property. That being so, if the Plaintiffs' land had been in its natural state, no doubt the Defendants must not do anything to let that land slip, or go down, or subside. If they were doing an act which it could be proved to me by satisfactory expert evidence would necessarily have that effect, I have no doubt this Court would interfere by injunction on the ground upon which it always interferes, namely, to prevent irreparable damage when the damage is only threatened. Of course they must have a much clearer and much stronger case to call for the interference of this Court by injunction where the damage is merely threatened and no damage

(1) 9 H. L. C. 503.

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Judgment, M.R.

has actually occurred, than when some damage has actually occurred, because in the one case you have no facts to go by, but only opinion, and in the other case you have actual facts to go by. If some damage has occurred it makes it manifest and certain that further damage will occur by reason of the prosecution of the works.

Now in this case, if it stands at all, it may well stand merely on opinion evidence, which would be sufficient ground for interference if all the experts agreed and the Court were satisfied that damage had occurred; and I think when I compare the evidence of these various experts, I must take it for this purpose as proved that if the Defendants work within fifteen yards of their boundary, and in their *New Mine Coal*, damage, and serious damage, will accrue to the Plaintiffs' buildings. But the question I have to decide is whether in law that entitles them to an injunction. I think it does not. In this case it is true the Plaintiffs or their predecessors acquired the mineral area, and acquired some of the land after the *Thick Coal* had been worked out and not before; but for the present purpose I lay out of consideration the fact of their ownership of anything, and I will treat the case as if the portions under which they possess the minerals, and the land so subsequently acquired, did not belong to them, and it appears as the result of the evidence that if that *Thick Coal* had not been extracted from under these portions of land, the intended operations of the Defendants would certainly not cause any substantial injury.

But it is said that, inasmuch as these operations have occurred in what I will call the intervening land, and have thereby weakened the support, it will entitle the Plaintiffs to prevent the owners of the land on the other side of this intervening land from working their mines in the way they could otherwise have worked them. But the first question one asks is, Why? Why should the act of the intervening owner, that is, the owner of the intermediate land, deprive men of their rights to their mines? It strikes one at once as a most extraordinary proposition. The act of the intervening owner for this purpose is rightful as regards the mine-owners whose mines are asked to be confiscated, for that is what it comes to. If they cannot work them they are confiscated. The Plaintiffs ask for the confiscation of their property, not because

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they have done any wrong, for they have done no wrong—not because the intervening owner has done any wrong, for he only worked his mines, and when he worked them he occasioned no injury to the person who owned the property on the other side; but it is said that inasmuch as he has taken out his coal first, the Defendants are deprived of the right of getting their mines. I say it is a startling proposition, and one which appears to me so unfounded in reason that I should be very loth indeed to believe it was founded in law.

Now, what is the right of the adjoining owner? As I said before, it is to the support of his land in its natural state—support by whom? The Judges have said, "Support by his neighbour." What does that mean? Who is his neighbour? It was contended that all the landowners in *England*, however distant, were neighbours for this purpose if their operations in any remote degree injured the land. But surely that cannot be the meaning of it. The neighbouring landowner to me for this purpose must be the owner of that portion of land, whether a wider or narrower strip of land, the existence of which in its natural state is necessary for the support of my land. As long as that land remains in its natural state, and it supports my land, I have no rights beyond it, and therefore it seems to me that he is my neighbour for this purpose. There might be land of so solid a character, consisting of solid stone, that a foot of it would be enough to support the land. There might be other land so friable and of such an unsolid character that you would want a quarter of a mile of it. But whatever it is, as long as you have got enough land on your boundary, which left untouched will support your land, you have got your neighbour's land whose support you are entitled to. Beyond that it would appear to me you have no rights.

Well, that being so, it is clear upon the evidence that the intervening portions of land between the boundary of the Plaintiffs' and the boundary of the Defendants' land was sufficient in its natural state for the support of the Plaintiffs' building. Therefore it appears to me that the Plaintiffs have no rights as against the landowners on the other side of that intervening space, and that they acquire no rights whatever the owner of the intervening land may have done; and, if the act of the intervening owner has

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been such as to take away the support to which the first landowner who complains is entitled, then, for whatever damage occurs from the act which he has done, the first owner may have an action, but an action against the intervening owner, not an action against the owner on the other side; and it appears to me that it would be really a most extraordinary result that the man upon whom no responsibility whatever originally rested, who was under no liability whatever to support the Plaintiffs' land, should have that liability thrown upon him without any default of his own, without any misconduct or any misfeasance on his part. I cannot believe that any such law exists or ever will exist. It appears to me, therefore, that the Plaintiffs are not entitled to damages for the acts of the Defendants, and that the only order I ought to make is to dismiss the action with costs.

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From this decision the Plaintiffs appealed. It was admitted on the appeal that if the land lying between the Plaintiffs' and Defendants' land had remained in its natural condition, the present works of the Defendants would not cause any injury to the surface of the Plaintiffs' land; but that in its present condition the Defendants could not work nearer than fifteen yards to their boundary without endangering the surface of the Plaintiffs' land. It was also admitted that the support of the surface on which the retort houses were built was not appreciably diminished by the works of the Plaintiffs' predecessors in title. The case came before the Court of Appeal on the 26th of June, 1877.

Argument.

Chitty, Q.C., and *Beale*, for the Appellants:—

If we cannot succeed in this claim, we have no remedy against any one for a manifest injury; for we had no right of action against the owner of the land lying between us and the Defendants where he worked his coal, because he caused us no present damage. It is only when the damage arises that we have a cause of complaint. Every man has a right to work out his coal until he begins to injure his neighbour. It is a question of who shall do it first: and he necessarily gets an advantage. We do not claim the whole support which nature gave us originally; but we say that each landowner must take the state of things as it exists,

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and so use his property as not to injure his neighbour. If the intermediate owner has made a cavity under his land, it is as much an injury to us as to the Defendants, for we are precluded from working our coal just as they are. The right to take minerals is not an absolute right, but has respect to the right of neighbouring landowners to the support of their land. The right to support is not an easement, but a right inherent in the ownership, and extends not only to the adjacent land but to all the neighbouring land that can affect the support: *Backhouse* v. *Bonomi* (1); *Brown* v. *Robins* (2); *Gale* on Easements (3). We do not say that if we or our lessees had done any act contributing to the loss of support, that might not have made a difference; but there is no question of that here; for the evidence shews that the working of our own lessees under the gasworks has not contributed to this subsidence. But we are not responsible for the acts of the intermediate owner in digging out his coal.

Southgate, Q.C., *Ince*, Q.C., and *Speed*, for the Defendants:—

It is admitted that if the ground had all remained as it was naturally we could have worked out our coal without causing a subsidence in the surface of the Plaintiffs' land. But the support which their land had in its natural state is the only support to which they are entitled: *Partridge* v. *Scott* (4). That case is an authority that if the intermediate land had been worked out by the Plaintiffs themselves they could not have maintained this action, and it can make no difference that it was done before they took possession of it. We had no power to stop the intermediate owner from working under his own land, and our right of working our coals cannot be prejudiced by his act. There is no authority for the Plaintiffs' contention that a landowner's right of support extends to any except the land actually adjoining to his. The consequences of such a doctrine would be most inconvenient. If a man builds a house on land which is undermined he may possibly, after twenty years, obtain an easement against his neighbours for support under the special circumstances; but no case of that kind is made here.

(1) 9 H. L. C. 503.
(2) 4 H. & N. 186.
(3) 5th Ed. p. 359.
(4) 3 M. & W. 220.

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Chitty, in reply.

JAMES, L.J.:—

I am of opinion that the judgment of the Master of the Rolls ought to be affirmed. It has been conceded in the course of the argument that this is, at all events, in fact, whatever it is in principle, an extension of the liability of mine-owners beyond anything for which there is an express authority in any decided case, that is to say, to a case in which the owner of the mines is not the adjoining owner *de facto* to the person whose property is alleged to have been injured; and it is also conceded for the purposes of the argument, and upon the facts of the case, that if the whole of the intervening land, to whomsoever it had belonged or may belong now, had been left in a state of nature, there would have been in that state of nature a sufficient support for the land of the Plaintiffs so as not to have imposed any burden upon the Defendants, or to have caused what the Master of the Rolls has called a confiscation of the Defendants' mineral property.

I agree with the Master of the Rolls that it seems a very startling thing to say that a man who has got a property in valuable mines can be deprived of those valuable mines because some one else between him and somebody else, a third person, has been doing something with his property. Whether you call it an easement or a natural right incident to property, or a right of property, it seems to me that those are only different modes of expressing the origin of the right, and do not express any difference in the right itself. Whatever it be, there must be, whether you use those terms or not, the idea and the substance of a dominant and servient tenement; and it does seem to me rather startling to find that the servient tenement can have its servitude or obligation increased by the act of the owner of the dominant tenement, or by the act of a third person intervening between the owners of the dominant and servient tenements. In all the cases the terms "adjacent," "neighbouring," and "neighbour" have been used, and I think that not immaterial. It has always been considered as the right of the adjacent owner, or the right of a subjacent owner; it has always been considered as the right of a man against his neighbour. Those are the terms which are always expressed in

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all the cases. As the Master of the Rolls in this case has pointed out, it does not necessarily apply to a case where the adjacent owner is the owner of a mere strip of land not affording support; and he has, therefore, endeavoured to define, and I think he has succeeded in defining, what adjacency and neighbourhood mean in these cases. He has said, using a very felicitous expression, that that is the adjacent land, that is the neighbouring property, which in extent would in the natural state of things have afforded the requisite support to the dominant tenement. I see no reason to dissent from that; there certainly is no authority which would entitle me to dissent from that proposition, and I cannot, upon principle, find any reason for extending the liability to an owner of some land beyond the zone which is so described. It appears to me really that if that were not so, and if the thing were to be determined exactly as the thing stands, that the moment the alleged damage is done, or the alleged damage is apprehended, there is no distinction in principle whether the intermediate acts which have changed the natural position of the properties are due to the Plaintiff himself or to somebody else, because if he has lawfully worked his mines, he would say, "I have done no wrong; I have done nothing that I was not lawfully entitled to do. I have worked out my mines under my own land as far as I might lawfully do so, and having done that I have now a cavity under my land, and I now warn you, my neighbour, that you must not follow my example and work your mines, because if you work your mines in addition to my working my mines you will let down my house or the surface from which I have removed my support"—thus throwing it entirely upon him. It seems to me that would be included in the result if it were to be tried at the time the thing was done; and that is exactly what we have authority against. Because in the case in the Court of Exchequer, *Partridge* v. *Scott* (1), as it appears to me, we have a direct authority for saying that where a man has himself diminished the subjacent support of his own land, he has no right of action or complaint against his neighbour whose acts by reason of that previous weakening have caused subsidence of the Plaintiffs' soil. That we have authority for. Upon the same principle, it

(1) 3 M. & W. 220.

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appears to me to follow, as I have pointed out, that if somebody, not the Plaintiff or the Defendant, has intervened and destroyed that which was the natural and legitimate support of the Plaintiff's property, that is to say, that portion of the neighbouring land which in a state of nature did exist for the purposes of support, no further consequence would arise to the prejudice of the owner of the further piece of land than would have arisen in the case of the Plaintiff doing it himself.

I am of opinion, therefore, that the Master of the Rolls' judgment is right, and must be sustained, and that the appeal must be dismissed with costs.

Baggallay, L.J. BAGGALLAY, L.J.:—

This appeal has been argued, and I think it has been conveniently argued, upon certain admissions or assumptions which limit the scope of the pleadings. According to the pleadings, the Plaintiffs' land consists of five several properties adjacent to each other, coloured with five different colours, which need not be particularly specified, and an injunction is asked to restrain working by the Defendants in such a way as to injure, by subsidence or otherwise, any portion of those five several lands, but the question has now been limited to the consideration of the land on which the retort houses are erected. It has been agreed also that certain conclusions which the Master of the Rolls arrived at upon the facts of the case shall, for the purpose of the argument, be treated as established. One of those conclusions of fact was that if the land intervening between the Plaintiffs' land in question and the land of the Defendants had remained in its natural state the Defendants might have worked up to their boundary without doing any injury at all to the land. Another of the conclusions of fact was, that assuming the lands to be as they are at present, then the Defendants cannot work nearer than within fifteen yards of the mineral boundary between the two properties without causing serious damage to the Plaintiffs' buildings; and a third admission is this—and I think it is an important one—that the support of the retort houses has not been in any way appreciably diminished by the working of the Plaintiffs themselves under the land on which they are erected.

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In this view of the case the suggested injury is, that by the working of the coal measures of the Defendants, and by means of the primary subsidence or falling in of the lands between the Defendants' land and the Plaintiffs' land, which lands are also, for the purpose of argument, assumed to have belonged to third parties, injury will be occasioned also to the Plaintiffs' land. Now it appears to me that when once you have arrived at the conclusions and admissions of fact to which I have just alluded, you have a case on which there can be no possible question. It seems to me to be quite contrary to all principle and authority to say that, by reason of the working by the Defendants upon lands which are not adjoining lands to the land of the Plaintiffs, and which, if the intermediate lands had remained in their natural state, would not have afforded support to the Plaintiffs' land, there can be a right of action against the Defendants. It appears to me that in the various cases, and they were all cited, I think, and discussed in the case of *Bower* v. *Peate* (1), the very essence of the thing is that the land should be adjacent; that is, adjacent in the sense defined by the Master of the Rolls.

Judgment, C. A. Baggallay, L.J.

BRETT, L.J.:—

Brett, L.J.

It appears to me strange, but I believe it to be the truth, that there is no authority on the particular point that we have to determine, and that it has therefore to be determined for the first time in this case. I assume for the purpose of this case that the land lying intermediate between the Defendants' land and that which the Plaintiffs desire to protect is in the hands of other persons than the Plaintiffs or the Defendants, and I assume that if the Defendants work under their own lands they will cause damage to the Plaintiffs' lands, and I further assume that if the Defendants should not work under their land that no damage will occur to the Plaintiffs' land, so that in one sense it will be the act of the Defendants which will cause the damage to the Plaintiffs' land. But then, as against that, I take the finding to be that if there had been no working under the intermediate land, working under the Defendants' land would not damage the Plaintiffs' land, and it is upon that last finding that I think this

(1) 1 Q. B. D. 321.

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case must be determined, because upon that last finding the Defendants' land is brought within this proposition, that it is land which in its natural state, and in the natural state of the Plaintiffs' land and of the intermediate land, would not be necessary as a support to the Plaintiffs' land at all. It seems to me to follow from that that if the Defendants worked in their own land up to the boundary when there were no workings in either the Plaintiffs' land or the intermediate land, their workings would have no effect whatever upon the Plaintiffs' land. They would have a perfect right, therefore, under these circumstances, to work up to the limit of their own land. Then can that right of theirs which they have under those circumstances be diminished by any act done either by the Plaintiffs or by any one for whose acts the Defendants are not otherwise responsible. It seems to me that their right cannot be so diminished. As for their right being diminished by any act of the Plaintiffs themselves, I think the reasoning of Baron *Alderson* in *Partridge* v. *Scott* (1) is conclusive to shew that the Defendants' right could not be diminished under such circumstances by reason of anything done by the Plaintiffs themselves on their own land. Well, if that be the case with regard to the Plaintiffs, and we have authority so far, we have only to go the additional step of saying that the Defendants' right shall not be diminished by the act of the intermediate owner—that is, the act of a person for whose action they are otherwise not at all responsible. They could not prevent that owner working in any way he pleased; they had no remedy against him for working in any way he pleased, and therefore, according to the ordinary principles of law, it seems to me their right ought not to be diminished by the acts of that person.

These are the reasons why I think the Master of the Rolls' proposition is a correct one, namely, that the only acts of the Defendants in mining for which they can be responsible with regard to adjacent and neighbouring owners are works under land which, if it remained in its natural state and the other lands remained in their natural state, would be a support to the land of the person complaining.

I can hardly think that this is a relation of dominant and servient tenements, and would rather, for myself, put it that this

(1) 3 M. & W. 220.

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is a relation between adjacent owners, which has an attribute which is the same as that which exists in the case of the relation between dominant and servient tenements, and that relation with regard to the reciprocal acts of the parties leads one to the same conclusion as that which we have already arrived at; although, therefore, this is a case of first impression, that is to say, a case in which we have, after the Master of the Rolls, for the first time, to decide what is the proper definition of "adjacent lands," I think the Master of the Rolls has given a very happy definition of it, and one which we ought to accept.

Solicitors: *Sharpe, Parker, & Co.*, agents for *E. J. Hayes, Birmingham; J. & F. Needham*, agents for *E. & A. Caddick, West Bromwich.*

FLOWER *v.* LLOYD.

C. A. 1877 *June* 11.

[1876 F. 37.]

Practice—Judgment obtained by Fraud—Appeal.

The Plaintiffs commenced an action to restrain the Defendants from infringing their patent, and obtained a judgment which was reversed by the Court of Appeal, who dismissed the action on the ground that the Defendants' process was no infringement of the Plaintiffs' patent. After the order on appeal was passed and entered, the Plaintiffs applied to have the appeal reheard with fresh evidence, on the ground that when an expert sent down by the Court, and whose evidence was in fact the only material evidence before the Court as to the nature of the Defendants' process, examined the Defendants' works, the Defendants had fraudulently concealed from him parts of the process, so that he had no opportunity of discovering the points in which it resembled that of the Plaintiffs:—

Held, that the Court of Appeal had no jurisdiction to rehear the appeal, and that the remedy of the Plaintiffs was by original action analogous to a suit under the old practice to set aside a decree as obtained by fraud.

Statement.

THIS was a motion by the Plaintiffs, made pursuant to special leave, that the appeal of the Defendants against the decree of Vice-Chancellor *Bacon*, dated the 17th of March, 1877, might be reheard before the Court of Appeal, and that the Plaintiffs might be allowed to adduce further evidence at such rehearing, or that the Court of Appeal would make such further or other order with

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reference to the matters in the affidavits of *Russell*, *Gear*, and *Ellison*, filed on the 6th of July, as to the Court might seem meet.

The action was for an injunction to restrain an alleged infringement by the Defendants of the Plaintiffs' patent process for printing from lithographic stones on tin plates. During the course of the action an expert was sent down by the Court to inspect the process carried on at the Defendants' works, and the account which he gave constituted substantially the whole evidence which was before the Court at the trial as to what the nature of that process was. Vice-Chancellor *Bacon*, on the 17th of March, 1877, decreed an injunction, but the Court of Appeal, on the 18th of May, reversed his decision, and dismissed the action, on the ground that the Defendants' process was no infringement of the Plaintiffs' patent.

Russell, *Gear*, and *Ellison*, mentioned in the notice of motion, were workmen who had recently been discharged from the service of the Defendants, and had made affidavits tending to shew that when the expert had visited the works the Defendants had fraudulently concealed parts of their process, so that he had no opportunity of discovering in what respects it resembled that of the Plaintiffs.

Argument.

Sir *H. Jackson*, Q.C. (*Marriott*, Q.C., and *Seeley*, with him), for the Defendants, took the preliminary objection that the Court of Appeal, having made a final order, which was now under appeal to the House of Lords, had no jurisdiction to entertain the application.

Kay, Q.C. (*Aston*, Q.C., and *Macrory*, with him), for the Plaintiffs:—

There must be some remedy where the Court has been imposed upon in the way we allege. Under the old practice a bill of review, on the ground of new matter discovered since the decree, would have been filed: *Daniell's* Chancery Practice (1). The *Judicature Act* contains no provision as to reviewing a judgment, but gives extensive powers of appeal, and I submit that the proper remedy is

(1) 5th Ed. p. 1423.

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a rehearing on new evidence. Rules of Court, 1875, Order LVIII., rule 2, provides that all appeals shall be by way of rehearing.

C. A. 1877 FLOWER v. LLOYD. Argument.

[JAMES, L.J.:—That is for the purpose of defining the mode of procedure and letting in fresh evidence.

JESSEL, M.R.:—They are to be by way of rehearing. Still they are appeals, and we have no original jurisdiction.]

If we had made the discovery before we came to this Court, the Court would have heard the appeal with fresh evidence, and there will be a failure of justice if this cannot be done now. In *Fuller* v. *Willis* (1) a second hearing of an appeal was allowed.

[JESSEL, M.R.:—That was under the old practice. I find nothing in the Act to give such a power to the Court of Appeal now. The old appeals in Chancery were rehearings before a Judge who had original jurisdiction.]

JESSEL, M.R.:— Judgment, Jessel, M.R.

The question which we have to decide is whether, final judgment having been pronounced by the Court of Appeal dismissing an action with costs, the Plaintiff in that action is entitled by motion to apply for leave for a rehearing of the appeal before the Court of Appeal on the ground of subsequent discovery of facts which shew or tend to shew that the order of the Court of Appeal was obtained by a fraud practised on the Court below.

If there were no other remedy I should be disposed to think that the relief now asked ought to be granted, for I should be slow to believe that there were no means whatever of rectifying such a miscarriage if it took place; but I am satisfied that there is another remedy. In the first place it must be remembered that the old practice remains where not interfered with by the new rules, and secondly, it must be remembered that all the jurisdiction of the old Court of Chancery is transferred to the High Court of Justice. Now, had the Court of Chancery any jurisdiction to give relief in such a case? It plainly had. I will read from the well-known treatise of Lord *Redesdale* (2): "If a decree has been obtained by fraud, it may be impeached by original bill," and he goes on to say, "without the leave of the Court"—but there are

(1) 11 Jur. 233. (2) 5th Ed. pp. 112, 113.

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very few such cases, in most cases you must obtain leave—"the fraud used in obtaining the decree being the principal point in issue, and necessary to be established by proof before the propriety of the decree can be investigated. And where a decree has been so obtained the Court will restore the parties to their former situation, whatever their rights may be." So there is no doubt that under the old practice you could have brought an original bill to impeach a decree for fraud, and could have got relief if fraud in obtaining the decree was proved. There was another totally different class of cases where you discovered subsequent matter which shewed that the decree was wrong, although there had been no fraud in obtaining it. That was called a supplemental bill in the nature of a bill of review, which brought the new matter forward, and again enabled the Court to do justice and get rid of the original decree. That always required leave. Now that being so, supposing the Court of Appeal has no jurisdiction to do what is now asked, there would be means of obtaining justice by an original action, which either would or would not require the leave of the Court according to circumstances. But the leave to be given when required was always to be obtained from the Court in which the bill was filed, or in which the action had been brought. Therefore there would be no difficulty in the Plaintiff's way in whichever class his case ranged. There is, therefore, no necessity for straining, if I may say so, the meaning of the words which confer power upon this Court, and we must look simply at the provisions of the Acts of Parliament as they stand. Now, when we look at the 4th and 19th sections of the *Judicature Act* of 1873, it is plain that this Court is simply a Court of Appeal and nothing more. It has very large powers conferred upon it with reference to disposing of appeals, but beyond that it has no jurisdiction. The 4th section says this: "The said Supreme Court shall consist of two permanent divisions, one of which, under the name of 'Her Majesty's High Court of Justice,' shall have and exercise original jurisdiction, . . . and the other of which, under the name of 'Her Majesty's Court of Appeal,' shall have and exercise appellate jurisdiction with such original jurisdiction, as hereinafter mentioned, as may be incident to the determination of any appeal." Therefore, if this Court has once determined an appeal,

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it has no further jurisdiction. Then the 19th section says, "The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice, or of any Judges or Judge thereof," and then further on—"For all the purposes of and incidental to the hearing and determination of any appeal within its jurisdiction, and the amendment, execution, and enforcement of any judgment or order made on any such appeal, and for the purpose of every other authority expressly given to the Court of Appeal by this Act, the said Court of Appeal shall have all the power, authority, and jurisdiction by this Act vested in the High Court of Justice." Therefore the original jurisdiction is, as regards the Court of Appeal, limited to that which is necessary for the determination of any appeal, and the amendment, execution, and enforcement of any order made on such appeal.

That being so, it appears to me that this motion is not within the jurisdiction of the Court of Appeal, and must be refused.

JAMES, L.J.:— James, L.J.

I am of the same opinion. It is very important, as I have said more than once, that this Court should set the example to other bodies of obeying the law, and that we here sitting as a Court of appellate jurisdiction should not attempt to enlarge that jurisdiction beyond what Parliament has chosen to give. It is beyond all question that we are made a Court of Appeal, and a Court of Appeal only, with incidental original jurisdiction for the purpose of exercising that appellate jurisdiction. That is our sole power. It seems to me to have been intentionally provided by the Act that we should not be part of the High Court. We are part of the Supreme Court. The High Court is one thing, and the Court of Appeal is another, and we have no power to make any order of or for the High Court except by way of substituting a proper order for an order which we think has been improperly made by the High Court. Therefore I think we have no original jurisdiction in this matter which can enable us to entertain the motion.

I agree with what has been said by the Master of the Rolls, that in the case of a decree (or judgment as we call it now) being

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obtained by fraud there always was power, and there still is power, in the Courts of Law in this country to give adequate relief. But that must be done by a proceeding putting in issue that fraud, and that fraud only. You cannot go to your adversary and say, "You obtained the judgment by fraud, and I will have a rehearing of the whole case" until that fraud is established. The thing must be tried as a distinct and positive issue; "you" the Defendants or "you" the Plaintiff "obtained that judgment or decree in your favour by fraud; you bribed the witnesses, you bribed my solicitor, you bribed my counsel, you committed some fraud or other of that kind, and I ask to have the judgment set aside on the ground of fraud." That would be tried like anything else by evidence properly taken directed to that issue, and wholly free from and unembarrassed by any of the matters originally tried. That was the old course of the law, and there seems to be no reason why that should not be now followed; and if it is true that there was a fraud practised upon the Court, by which the Court was induced to make a wrong decree, the way to obtain relief will be to bring a fresh action to set aside the decree on the ground of fraud.

Baggallay, L.J. BAGGALLAY, L.J.:—

During the argument of the matter I felt great hesitation in negativing the proposition that there was jurisdiction in this Court to rehear an appeal in which a judgment has been pronounced and entered up which was obtained by fraud on the part of those in whose favour it was pronounced. I felt this hesitation mainly because I did not see my way clearly to any mode by which justice could otherwise be done. But, upon further consideration of the case, I think that justice can be done by adopting a course analogous to that taken under the old practice, where when a decree had been obtained by fraud a bill was filed in the original Court in which the suit had been brought for the purpose of setting the decree aside. I therefore do not see any reason to dissent from the view expressed by the other members of the Court.

Solicitors: *G. H. K. Fisher; Flower & Nussey.*

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Ex parte TENNANT. *In re* HOWARD.

C. A. 1877 July 7, 12.

Partnership—Participation in Profits—Interest in Profits by way of Security —Test of Partnership—Intention.

A father, whose son was about to become a member of *Lloyd's* and to commence the business of an underwriter, became security for him, in compliance with the rules of *Lloyd's*, to the amount of £10,000. The son executed a written agreement, which contained a recital of the security given by the father, and by which the son covenanted with the father (*inter alia*) that *S.*, and no other person, should underwrite at *Lloyd's* in the name of the son; that *S.* should be paid £200 a year and one-fifth of the net profits of underwriting; that the father should be at liberty to withdraw the whole of his security on notice being given to the son and other necessary parties, and immediately after such notice *S.* should cease to underwrite for the son or in his name; and that half the net profits of underwriting, deducting the share of *S.*, should, together with £25 per annum, be considered as owing and should be paid to the father by the son. The business was carried on in the son's name alone, the creditors not knowing that the father was in any way connected with it:—

Held, that no partnership was constituted between the father and the son.

Participation in profits is not conclusive evidence of the existence of a partnership. It is very cogent evidence, and, if it stands alone, may be conclusive evidence of a partnership. But the effect of participation in profits may be outweighed by other circumstances.

Pooley v. *Driver* (1) discussed.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Murray*, sitting as Chief Judge in Bankruptcy.

In September, 1871, *Charles William Howard*, who had previously been an officer in the army, was desirous of becoming a member of *Lloyd's* and of commencing business as an underwriter. For this purpose it was necessary, according to the rules of *Lloyd's*, that he should find security for the payment of any losses which might be incurred in the business. His father, Mr. *Charles Howard*, agreed to find the security for him, and to do this he transferred into the joint names of himself, his son, and Mr. *C. B. Stephenson*, the secretary of *Lloyd's*, £5000 *Scinde* Railway Stock, and executed a deposit bond to secure all underwriting losses incurred in the son's business, which losses were, if not otherwise paid, to be

(1) 5 Ch. D. 474.

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raised and paid by means of a sale of a sufficient part of the railway stock, the remainder of which, after satisfaction of those losses, was to be retransferred to him upon his ceasing to be security for his son. He also, by way of further security, signed a guarantee bond for £5000 to the secretary of *Lloyd's* to secure the payment of the son's underwriting losses beyond the value of the railway stock. The son was accordingly admitted a member of *Lloyd's* in September, 1871, and commenced the underwriting business, which was carried on in his name alone. On the 4th of January, 1872, an agreement in writing was entered into between the father and the son. It contained a recital that the father had become security for the son by depositing £5000 *East India* Railway Stock in the names of himself, the son, and *C. B. Stephenson*, as well as by a further bond of £5000, in order to enable the son to become an underwriter at *Lloyd's*, and had also borrowed the sum of £200 at interest, to be placed to the account of the son at the *Imperial Bank* (the receipt of which sum of £200 the son did thereby acknowledge), and it was thereby witnessed that in consideration of the premises the son did thereby, for himself, his heirs, executors, and administrators, covenant with the father, his executors and administrators, in the manner following:—

"(1.) Mr. *S. H. Hewitt* and none other shall underwrite at *Lloyd's* in the name of the said *C. W. Howard*.

"(2.) The said *S. H. Hewitt* shall be paid the sum of £200 a year by quarterly instalments, together with one-fifth part of the net profits of underwriting.

"(3.) The said *Charles Howard* shall be at liberty to withdraw the whole of the aforesaid security on notice being given by him or his agent to the said *C. W. Howard* and other necessary parties; and immediately after such notice the said *S. H. Hewitt* shall cease to underwrite for the said *C. W. Howard*, or in his name; and the said *C. W. Howard* will, when permitted so to do by the rules of *Lloyd's*, immediately retransfer the said £5000 *East India* Railway Stock, or the portions of it which may remain, into the name of the said *C. Howard*, or his assigns, and the bond of the said *C. Howard* for the sum of £5000 as aforesaid shall be cancelled.

"(4.) The said *C. W. Howard* shall not until all his just debts

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are paid expend a greater sum than £200 per annum on his living and other personal expenses.

"(5.) One half of the whole of the said net profits of underwriting, deducting therefrom the share of the said *S. H. Hewitt*, shall, together with the sum of £25 per annum, be considered as owing and shall be paid to the said *C. Howard*, or his agent or assigns, by the said *C. W. Howard*.

"(6.) The said *C. W. Howard* shall not pay or become answerable for the debt or debts of any one, nor give or otherwise alienate, nor lend or put out at interest, or speculate with any sum of money which he may possess or be entitled to, unless and until all his just debts are paid.

"(7.) The said *C. W. Howard* shall, when required by the said *C. Howard* or his agent, immediately repay to the said *C. Howard* the sum of £200 and interest thereon.

"(8.) The said *C. W. Howard* shall keep his account as underwriter at the said bank, distinct from his account as broker, and his said account as underwriter shall on demand be liable to inspection by the said *C. Howard* or his agent, and a copy of the said account duly forwarded by the said *C. W. Howard*.

"(9.) The said underwriting account shall not be touched by the said *C. Howard* or the said *C. W. Howard*, but when such account shall exceed £500, and not before, the said *C. W. Howard* may, on consent given by the said *C. Howard* or his agent, withdraw such a sum of money from the said account as may be agreed upon for himself, and shall at the same time withdraw an equal sum and pay the same to the said *C. Howard* in his account."

Though this agreement was expressed to be made between the father and the son it contained no covenant on the part of the father, and was executed by the son alone.

The underwriting business was carried on in the name of the son alone, the creditors not knowing anything of the father's connection with it, except the fact that he had become surety for the son. The father received the dividends of the railway stock, or of such part of it as was not required for the payment of losses incurred in the business. The son carried on also in his own name two other businesses: the one that of an insurance broker, the other

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that of a carrier. The father had no connection with either of those businesses. In February, 1876, the son filed a liquidation petition, and was afterwards adjudicated a bankrupt. The father claimed to be entitled, as a partner in the underwriting business, to collect the assets of that business, and to apply them in discharging its debts. The trustee in the bankruptcy, on the other hand, claimed a right to receive those assets, and to apply them as part of the estate of the bankrupt in paying all his creditors *pari passu*.

The Registrar held that the father was a partner in the underwriting business, and was therefore entitled to that which he claimed. The trustee appealed.

Argument.

Benjamin, Q.C., and *Romer*, for the trustee:—

The agreement of January, 1872, did not constitute a partnership; the object was only to indemnify the father against the security which he had given for the son. The father had no right to a share of the profits *quâ* profits; it was to be considered as "owing" to him. The language is applicable to the relation of debtor and creditor, not to that of partners. One partner does not "owe" to the other his share in the profits of the firm; it is a debt from the firm. The son was *dominus* of the whole business which was carried on in his name alone. *Bramwell*, B., in *Holme* v. *Hammond* (1), adopts with approval the explanation of the effect of *Cox* v. *Hickman* (2), given by *O'Brien*, J., in *Shaw* v. *Galt* (3), "that a partnership, even as to third parties, is not constituted by the mere fact of two or more persons participating or being interested in the net profits of a business; but that the existence of such partnership implies also the existence of such a relation between those persons as that each of them is a principal and each an agent for the others." In the present case it is impossible to say that the father was the agent of the son in the business. The judgment of Lord *Cranworth* in *Cox* v. *Hickman* (4) shews that this is a correct statement of the principle. The judgment of Lord *Blackburn* in *Bullen* v. *Sharp* (5), a case very like the

(1) Law Rep. 7 Ex. 218, 230.
(2) 8 H. L. C. 268.
(3) 16 Ir. C. L. Rep. 357, 375.
(4) 8 H. L. C. 304, 306.
(5) Law Rep. 1 C. P. 86, 112.

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present, confirms this view. One partner certainly cannot owe the other his share of the profits; it belongs to him already.

[COTTON, L.J.:—You would say that the clause in this agreement, which deals with the father's share of profits, originates his interest in them, and does not merely define the quantum of interest already belonging to him as a partner.]

The question whether the relation of partnership exists must depend on the real intention and contract of the parties, the right to participate in profits being a strong test: *Mollwo, March, & Co.* v. *Court of Wards* (1). There a firm of British merchants at *Calcutta*, in consideration of moneys advanced and to be advanced to them by a Hindoo Rajah, agreed to carry on the business subject to his control in several particulars, and that he should receive a commission of 20 per cent. on the profits of the firm until the debt due to him should be paid off, with 12 per cent. interest on cash advances, and it was held that he was not a partner. The intention of the parties and all the surrounding circumstances must be looked at: *Ross* v. *Parkyns* (2); *Pooley* v. *Driver* (3). Applying these principles to the present case, it is clear that the father was only taking a security, and that no partnership was constituted. In *Pooley* v. *Driver* the Master of the Rolls held that the parties meant to be *de facto* partners, but to escape the liabilities of partners. There is no pretence for coming to that conclusion in the present case.

De Gex, Q.C., and *C. H. Turner*, for the father:—

The test is this, Is there a simple participation in profits and nothing more? If that is all, a partnership is constituted. That is so here. In *Cox* v. *Hickman* (4) there was in effect a mortgage of the business to the creditors of the persons who had been carrying it on. *Waugh* v. *Carver* (5) has never been overruled. In all the other cases relied upon by the Appellant the participation in profits was not pure and simple; it was by way of security for a debt. Another way of putting the test is this, Is the business carried on on behalf of the alleged partner? If so, the allegation

(1) Law Rep. 4 P. C. 419.
(2) Ibid. 20 Eq. 331.
(3) 5 Ch. D. 458.
(4) 8 H. L. C. 268.
(5) 2 H. Bl. 235.

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Argument.

is proved. This is the way Lord *Wensleydale* expressed it in *Cox* v. *Hickman* (1). Interference in the management of the business is not necessary; a dormant partner never interferes. In the present case neither father nor son controlled the business; it was managed by an agent for them both. It was no more the business of the one than of the other. In *Mollwo, March, & Co.* v. *Court of Wards* (2) the Rajah was only a mortgagee. The judgment of the Privy Council was founded on the fact that he had no interest in the profits *quâ* profits. The Court relied on the distinction stated by Lord *Eldon* in *Ex parte Hamper* (3). In *Cox* v. *Hickman* there was a trust of the profits. Lord *Blackburn's* judgment in *Bullen* v. *Sharp* is clearly in our favour. He says (4): "The true question is, as stated by Lord *Cranworth*, whether the trade is carried on on behalf of the person sought to be charged as a partner, the participation in the profits being a most important element in determining that question, but not being in itself decisive; the test being, in the language of Lord *Wensleydale*, whether it is such a participation of profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business." In the present case there is a simple agreement to share in the net profits; that necessarily implies a liability to share in the losses. The law is clearly explained by the Master of the Rolls in *Pooley* v. *Driver*. He says (5), "If we find an association of two or more persons formed for the purpose of carrying on in the first instance, or of continuing to carry on business, and we find that those persons share between them generally the profits of that business, as I understand the law of the case as laid down by the highest authority, those persons are to be treated as partners in that business, unless there are surrounding circumstances to shew that they are not really partners." And he further says (6) that "the participating in the profits is sufficient proof of partnership if there is nothing to get rid of it." Here the business was really to be carried on on behalf of the father, that is, he was a partner. In every case of a dormant partner the partner who actually receives the profits pays over to

(1) 8 H. L. C. 312, 313.
(2) Law Rep. 4 P. C. 419.
(3) 17 Ves. 403, 412.
(4) Law Rep. 1 C. P. 112.
(5) 5 Ch. D. 474.
(6) Ibid. 476.

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the other, not a share of the particular moneys which he receives, but an equivalent. In *Pooley* v. *Driver* (1) the stipulation was only for a sum equivalent to five-sixths of the profits.

They referred also to *In re Rowland & Crankshaw* (2); *Brett* v. *Beckwith* (3); *In re Childs* (4).

JAMES, L.J.:—

Judgment, James, L.J.

I am of opinion that the order of the Registrar must be discharged. There was no partnership intended. I think it quite clear that no one can read this deed without seeing that it was never intended between the parties themselves that there should be a partnership created with the liabilities of a partner; and I think that no partnership was created by force of law contrary to the intent and meaning of the parties. There is no doubt that the general law has been laid down that participation in profits is very cogent evidence (I think some of the learned Judges have said it is almost conclusive evidence) of participation in and a right to that thing out of which the profits are derived. At the same time that evidence is capable of being controlled by the surrounding circumstances. The surrounding circumstances in the present case seem to me entirely to control it, and to shew that there was no partnership intended, and no partnership created. It is necessary to consider the provisions of the agreement. It is a unilateral agreement. It is executed by the son alone, and he enters into certain covenants with his father. It recites that the son had become an underwriter. Now, nobody can carry on the business of an underwriter without being a member of "*Lloyd's*," and in order that he might become such underwriter, the father had, in compliance with the requirements of that association, deposited a sum of £5000 stock, and had entered into a a bond for £5000 as surety for the son. Then the son enters into certain covenants for the protection of the father, his surety. Amongst those covenants is one that *Hewitt* alone shall underwrite at *Lloyd's*, in the name of the son. That was a covenant for the breach of which of course the son would have been liable in damages, but there was nothing in it that would have entitled

(1) 5 Ch. D. 474.
(2) Law Rep. 1 Ch. 421.
(3) 3 Jur. (N.S.) 31.
(4) Law Rep. 9 Ch. 508.

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the father to file a bill to restrain the son from underwriting in his own name. If the father was dissatisfied with the son with regard to the business, or for any other reason, he was at liberty to withdraw the whole of the security he had given on notice to the son and other necessary parties. This was in substance the arrangement. The father said, "I will deposit the required amount, but you shall employ as agent a man whom I think a trustworthy person. I am to be at liberty at any moment I please to withdraw the whole amount I have deposited as security, and to give notice to withdraw my bond so as to cease to be your surety." Then comes the clause which is said to give an unqualified right of participation in the profits, and that is perhaps the most material clause in the agreement. It says, "That one-half of the whole of the net profits of underwriting, deducting therefrom the share of the said *S. H. Hewitt,* together with the sum of £25 per annum" (that was a clear personal debt) "shall be considered as owing, and shall be paid to the said *Charles Howard,* or his agent or assigns, by the said *Charles William Howard.*" Now if, instead of saying that one-half of the profits should be paid, it had said, "he shall pay a sum equal to one-half," or had employed any other similar language, it would have come exactly within *Mollwo, March, & Co.* v. *Court of Wards* (1), in which there was a payment, not of half, but of 25 per cent. of the profits. I think this clause is in substance an agreement by the son to pay the father a sum equivalent to one-half the net profits, and I test it in this way: If the son had become bankrupt (as indeed he has) in respect of other matters, and not in respect of losses in the insurance business, and the insurance business had been very profitable, so that the sums outstanding in the broker's hands would have more than paid the losses, and left net profits to be divided, the father could not have claimed a half of the net profits as having become his property as profits, but he would have been driven to prove for it in the bankruptcy of the son, who, under that clause, was made his debtor for the amount of half the profits. That is to say, the father was not entitled to have half the profits *in specie* paid out of the assets *in specie,* but he had a right as creditor against the son as debtor in respect of the amount of

(1) Law Rep. 4 P. C. 419.

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half the profits which had been realized, in precisely the same character and to the same extent as he was entitled as a creditor to sue for the £25 per annum, which beyond all question was a sum wholly irrespective of profits or losses. Then it is not immaterial to observe that the father lent the son £200, which the son borrowed for the purpose of enabling him to carry on the business. If that sum was really partnership money, or was left in the business for the purpose of the partnership, it would not be a debt from the son to the father, but it would be a sum which the father would be entitled to recover out of the partnership assets. But the deed says, "The said *Charles William Howard* shall, when required by the said *Charles Howard* or his agent, immediately repay to the said *Charles Howard* the sum of £200 and interest thereon." That is, the sum which was lent to the son for the purpose of carrying on the business was liable to be recalled by the father at any moment, and the father was entitled, as I have already said, at any moment to give notice to *Lloyd's* to withdraw his suretyship for the son. It seems to me that the relation between them was that which it purports to be on the face of the deed. The father, no doubt, was liable for the debts of the son to the extent of his suretyship, which he had given by means of a special contract with *Lloyd's*, and it was in the character of a surety, and only in the character of a surety, that he was receiving a certain control over the business, and a certain right to participate in the profits, as a remuneration to him for having incurred that liability as surety for the son.

It appears to me from all the surrounding circumstances that the whole intent and meaning of the parties as expressed by their agreement was, that the father should not be a partner and should not have the rights of a partner; that he should have no specific right to interfere with the moneys in the hands of the brokers, or to intercept anything between a broker and the son, but that he was relying on the personal responsibility of the son to pay that which he intended to have as his reward for what he had done—one-half of the net profits. That being so, and there being no fraud upon the creditors, the father having never held out to the creditors that he was responsible, and having provided a fund for the creditors by means of his suretyship, it seems to me impossible to

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say that the creditors were in any way prejudiced or damnified by the mode in which this bargain was made between the father and the son. The fact is that the father is now seeking, contrary to his first impression as to what the relations between them were, to make out that he was a partner. I am of opinion—and I decide against him now as I should have decided in his favour if any creditor had attempted to sue him for the underwriting account—that he was never anything more in this matter than a surety for the son in the manner and to the extent mentioned in the agreement.

I am of opinion that the declaration of the Registrar ought to be reversed, and that we should declare that there was no partnership.

Baggallay, L.J.

BAGGALLAY, L.J.:—

I am of the same opinion. It is unnecessary to consider which of the several definitions of a partner which have been referred to is the most accurate. It is sufficient, I think, for the purpose of the present case, to start with the proposition that an agreement to share in the profits *primâ facie* constitutes a partnership, unless there is something in the contract taken as a whole which militates against that assumption. It appears to me that there is in this contract, taken as a whole, that which militates against the assumption of an intention of creating a partnership or of a partnership having been created. Lord Justice *James* has pointed out that this is a unilateral contract. There are covenants entered into by the son with his father, and the reason why he has entered into those covenants appears from the recitals in the deed, viz., that the father had become security for the son to the extent of £10,000 to the committee of *Lloyd's*, in order that the son might become a member of *Lloyd's*, and in addition to that he had also borrowed for the purposes of his son, in order that his son might open a banking account in connection with his underwriting business, the sum of £200. Here is a young man commencing a new business, and we find such provisions in this deed as we should naturally expect where a father was putting his son forward in business in this way, and risking a large sum of money in order to give the young man a start. In the first place, the young man having no

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actual experience of the underwriting business, it is provided that the underwriting shall be actually done (as we know it is done every day in the underwriting business) by a clerk who has a special knowledge of the business, and of course provision is made for the payment of the person who has to discharge those duties. Then a power is reserved to the father at any time to withdraw the security which he had given, subject of course to the rules of *Lloyd's* being respected, which might possibly have the effect of causing him to lose a portion of the money for which he had become security. Then, passing over for a moment the 5th clause, which has given rise to so much discussion, we come to other clauses, all of which point to the same direction, the son is to keep his underwriting account separate and distinct from his account in relation to other business in which he had then embarked or was about to embark. This provision was to enable the father to have an opportunity of seeing the account from time to time for his own protection.

Judgment, Baggallay, L.J.

Then it is suggested that the 5th clause gives him a share of the profits. In an indirect manner it does, no doubt, give him a share of the profits. But we start with the proposition, that an agreement to give a share in the profits does not necessarily constitute a partnership, and that you must have regard to the whole terms of the contract between the parties. Therefore the mere fact that in an indirect way there is an agreement to share the profits does not in itself constitute a partnership. Lord Justice *James* has also pointed out that there is not a right to take the share of the profits out of the assets of the business, but merely a creation of a debt from the son to the father of a sum equivalent to one moiety of the profits ascertained in a particular way. It is made a debt from the son to the father in exactly the same way as the £25, which really has nothing whatever to do with a partnership.

It appears to me that the view taken by the Registrar was not warranted by a full consideration of the terms of the contract. His decision must therefore be reversed.

COTTON, L.J.:—

Cotton, L.J.

I am of the same opinion. It must be remarked that the

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question arises in rather a curious way. It is not a creditor who is seeking to make the father liable as a dormant partner, but it is the father himself, for his own benefit, who is trying to make out that he is a partner. I am not at all satisfied that, if it appears from the deed that the intention of the parties was that he should not be a partner, he is entitled to come and say, "I claim to be a partner so as to constitute a joint estate for my benefit contrary to my intention so far as it could be carried into effect according to law." But I do not think it necessary to decide the case upon that point, because I quite concur with the Lords Justices that this arrangement does not constitute a partnership even as to third parties.

I think that if any one were to look at the deed and read it carefully without reference to the cases which have been decided on the question whether participation in profits makes a partner, he could not doubt that there was no intention to constitute the relation of partnership between the father and the son. There is a contract entered into by the son alone, and a covenant by him alone, in order to provide that he shall carry on his business in a reasonable way, and otherwise conduct himself reasonably. I call it his business, because the deed specially recognises the business as one which he was to carry on, and in which his father was interested (I put aside for the present the question of participation of profits) only in this way—that he had become by a contract with *Lloyd's* surety for the son's liabilities to his creditors. Now, that being really the obvious intention of the parties, construing the deed fairly, the share in the profits was a mere debt from the son to his father.

Notwithstanding, however, that that was the intention, does the law say, "you, the father, are nevertheless a partner"? I am of opinion that it does not. It is said that the father was liable for losses. Yes, liable for losses, it is true, but not under any contract between him and his son, nor under any contract between him and the creditors, unless you make out in the first instance that he was a partner. As between himself and his son he in no way contracted that he would bear a share of the losses, but he has contracted with *Lloyd's*, as surety for his son, that he will pay, to the extent of the security which he gave, those

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debts, which, on the very notion of his giving security for them, were not his debts, but the debts of his son.

And, beyond that, it is to be remarked that by that covenant the father makes himself liable for the debts, not for a share of the losses, but for the entirety, if the son does not pay them. This liability is altogether different from that of a partner, who, of course, as regards the partnership contract, is liable only for his share of the losses. The liability of the father to *Lloyd's* was only to arise if and when the son could not pay the debts.

Now, as to participation in profits, there is, no doubt, a clause in the agreement which, for the purpose of my judgment, I will assume to amount to a participation in profits. In one sense it is so. *Waugh* v. *Carver* (1) might possibly have been relied upon as an authority for saying that the father was a partner, but it is impossible to say that the rule laid down in that case is now unqualified law. Lord *Blackburn*, in *Bullen* v. *Sharp* (2), clearly refers to it as qualified. And I take it the law is this, that participation in profits is not now conclusive evidence of the existence of a partnership, but it is one of the circumstances, and a very strong one, which are to be taken into consideration for the purpose of seeing whether or not a partnership exists, that is to say, whether there was a joint business, or, putting it in another way, whether the parties were carrying on the business as principals and as agents for each other—whether it is a joint business or the business of one only. Now let us see what is said by Lord *Blackburn* (3): "I think that the *ratio decidendi* (of *Cox* v. *Hickman* (4)) is, that the proposition laid down in *Waugh* v. *Carver*, viz., that the participation in the profits of a business does of itself, by operation of law, constitute a partnership, is not a correct statement of the law of England" (it has not been overruled, but it is qualified certainly), "but that the true question is, as stated by Lord *Cranworth*, whether the trade is carried on on behalf of the person sought to be charged as a partner, the participation in the profits being a most important element in determining that question, but not being in itself decisive; the test being, in the language of Lord *Wensleydale*, whether it is such a participation of

(1) 2 H. Bl. 235.
(2) Law Rep. 1 C. P. 86, 112.
(3) Law Rep. 1 C. P. 112.
(4) 8 H. L. C. 268.

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profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business."

Certainly the Master of the Rolls does not in any way dissent from the proposition of law so laid down, because he quotes with approval the authority of Mr. Justice *Lindley*, stating the rule in substantially the same way. The Master of the Rolls, in *Pooley* v. *Driver* (1), says, "I may cite further from p. 45 of the 3rd edition of Mr. *Lindley's* book, considering that learned gentleman is now a Judge, the conclusion that he comes to as to the effect of the case of *Cox* v. *Hickman* (2),—'that *primâ facie* the relation of principal and agent is constituted by an agreement entitling one person to share the profits made by another to an indefinite extent; but that this inference is displaced if it appears from the whole agreement that no partnership or agency was really intended.'" So that the Master of the Rolls, Mr. Justice *Lindley*, and Lord *Blackburn*, all agree that what you must look at is whether the relation of principal and agent existed, a participation in profits not necessarily constituting a partnership, but being a matter which is to be considered, and which may be conclusive if there is nothing else to prevent there being a partnership. Now the way in which the profit is to be participated in is really the essence of the whole matter. If the business is carried on by one man as agent for another as principal, the mere fact that he carries it on for another gives that other whose agent he is the right, from his position of principal, either to the whole or to a share of the profits. If there is a mere agent the principal can of course require the whole of the profits, but if the agent is also interested, then, unless there is any stipulation as to the division of the profits, the profits must be divided equally. And if in the present case there was in the first instance a recognition of the right of the father to participate in the profits, and the 5th clause of the agreement only defined in what proportion the profits should be divided, that clause would be very strong, and possibly conclusive, evidence of the existence of a partnership. If they stood in the relation of principal and agent to one another, and each could act for the other, the profits made by the one were profits made, not on his

(1) 5 Ch. D. 481. (2) 8 H. L. C. 268.

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behalf, but as the agent of the other. But here there is no recognition at all of a right on the part of the father to participate in profits independently of the 5th clause of the agreement. It is not that, considering the parties entitled independently of it to share in the profits, that clause defines the proportion of profits, but it creates *de novo*, as not existing before, a right in the father to call upon the son, as his debtor, to pay him a certain sum —half the profits, or a sum equal to half the profits. It does not recognise him as being already a partner, but treats him as being a person not entitled, but for that clause, to any participation in profits. It gives him a right to profits *quâ* debt, not as a partner, who, of course, independently of any such clause, would have a right to share in the profits, though it had been left undecided what his share of the profits should be.

In my opinion, therefore, that clause giving the father the right to share in the profits does not establish that the father was a partner.

There is only one other point I desire to mention, that is, the argument of Mr. *De Gex*, that if a business is carried on by one person on behalf of another there is a partnership. There is a fallacy in the words "on behalf." Giving a person a share in the profits makes the business to be in one sense carried on on his behalf, that is, for his benefit, but this is going back to the argument that a participation in profits makes a partnership. That very sentence, however, where Lord *Cranworth*, in *Cox* v. *Hickman* (1), uses the words "on behalf," shews that he did not mean to refer to a mere right to share in the profits, but that he meant to speak of the acting of one partner for the other when one partner is the agent of the partnership, and the agent, therefore, of his co-partner. I concur in the opinion of the Lords Justices that the Registrar's order must be reversed.

Solicitors for Appellant: *Lawrance, Plews, & Co.*
Solicitors for Trustee: *John Turner & Son.*

(1) 8 H. L. C. 306.

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C. A.
1877
July 18.

DAWKINS *v.* LORD PENRHYN.

[1877 D. 59.]

Restraint on barring Estate Tail—Recovery—Statute of Limitations (3 & 4 *Will.* 4, c. 27)—*Demurrer—Allegation of Fact.*

A testator, who died in 1782, devised lands to his son *R. P.* and the heirs of his body, but upon special trust and confidence in his said son that in case he should have no issue of his own body he would not do or suffer any act in law or otherwise to obstruct or prevent the subsequent devises and limitations of the estate from taking effect, but, on the contrary, would do, or cause to be done, every act in his power to establish and confirm the same; and if *R. P.* should happen to die leaving no issue, then the testator gave the estate over upon trusts under which the Plaintiff's grandfather was second tenant for life with remainder to his sons successively in tail male. The Plaintiff commenced this action in 1877, and by his statement of claim alleged that *R. P.* died without issue in 1808; that the next tenant for life died without issue in 1840, whereupon the Plaintiff's grandfather became entitled in possession as tenant for life; that the grandfather died in 1852, leaving his eldest son, the Plaintiff's father, who thereupon became entitled as tenant in tail in possession; and that the Plaintiff's father died in 1864, leaving the Plaintiff his eldest son. That the Defendant had been in possession ever since 1840, and claimed to be entitled to such possession under the will of *R. P.*, whom the Defendant alleged to have acquired the fee simple under a common recovery suffered by him in 1782. The Plaintiff submitted that any such recovery was invalid, if not at law, at all events in equity, and claimed to recover the estate. The Defendant demurred on the ground that the recovery was good and gave *R. P.* the fee simple; and also *ore tenus*, on the ground of the *Statute of Limitations*, and the demurrer was allowed by *Malins*, V.C.:—

Held, on appeal, that the directions in the will purporting to restrain *R. P.* from barring the remainders expectant on his estate tail were ineffectual, and could not prevent his acquiring the fee simple by a common recovery:

Held, however, that technically the demurrer on this ground would not hold, for that the statement of claim did not sufficiently allege as a fact that a common recovery had been suffered:

But *held*, that inasmuch as the *Statute of Limitations* (3 & 4 Will. 4, c. 27) does not merely bar the right to recover land, but takes away the title to the land, it may be raised by demurrer; and that as the statement of claim distinctly shewed that the estate tail, in respect of which the Plaintiff claimed, had come into possession more than twenty years ago,

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and that the Defendant had been in possession during the whole of that period, and contained no allegation of any circumstance bringing the case within any of the savings in the statute, the demurrer had been rightly allowed.

Statement.

THIS was an appeal by the Plaintiff from an order of Vice-Chancellor *Malins* allowing a demurrer by Lord *Penrhyn*, the sole Defendant in the action.

The allegations in the statement of claim, so far as it is material to set them out, were to the following effect:—

John Pennant, being entitled in fee to one moiety of *Penrhyn Castle* and certain other estates in the county of *Carnarvon*, made his will, dated the 25th of February, 1779, whereby he devised all his estates in *Wales* to his son *Richard Pennant*, afterwards Baron *Penrhyn*, "and to the heirs of his body lawfully to be begotten, but upon special trust and confidence in his said son, that in case he should have no issue of his own body lawfully begotten that he his said son would not do or suffer any act in law or otherwise to obstruct or prevent the several following devises, trusts, and limitations of the said testator's estates and plantations from taking effect, but, on the contrary, that he the said *Richard* Baron *Penrhyn* would do, or cause to be done, every act in his power to establish and confirm the same. And the said testator gave and devised, in case his said son should happen to die leaving no issue of his body lawfully begotten, all the said testator's said freehold messuages, lands, tenements, and hereditaments in the said principality of *Wales*, subject nevertheless to the payment of the annuities thereinafter mentioned unto *W. Gale*, *J. Shickle*, and *W. Atherton*, their heirs and assigns, to the use of them, their heirs and assigns, in trust" as therein mentioned. These trusts, as regarded one moiety of the testator's estate, were for *George Hay Dawkins*, the second son of *Henry Dawkins* the elder, for life, with remainder to his first and other sons successively in tail, with remainder to *Henry Dawkins* the younger for life, with remainder to his sons successively in tail male.

The testator died in 1782. *Richard* Baron *Penrhyn* entered into possession and continued in possession till the year 1808, when he died leaving no issue.

On the death of *Richard* Baron *Penrhyn*, *George Hay Dawkins*,

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C. A. 1877 DAWKINS v. LORD PENRHYN. Statement.

who took the name of *Pennant*, entered into possession of one moiety of the testator's moiety of the estates in question, and remained in possession till the 17th of December, 1840, when he died without issue male.

Henry Dawkins the younger died on the 25th of October, 1852, leaving *Henry Dawkins*, the father of the Plaintiff, his eldest son and heir-at-law, who thereupon became entitled to one-fourth of the estates as tenant in tail male in possession. *Henry Dawkins*, the father of the Plaintiff, was up to his death ignorant of his right to the one-fourth of the estates.

The Plaintiff's father died on the 13th of November, 1864, leaving the Plaintiff his eldest son and heir-at-law. The Plaintiff was entirely ignorant of the contents of the will until February, 1875.

"13. The Defendant entered into possession and the receipt of the rents and profits of the said one-fourth part of the said *Penrhyn Castle* and hereditaments upon the death of the said *George Hay Dawkins*, and the Defendant has since continued in such possession and receipt.

"14. The Defendant claims to be entitled to such possession and receipt under the will of the said *George Hay Dawkins*, and he claims that the said *George Hay Dawkins* acquired the fee simple and inheritance of the said one-fourth part of the said *Penrhyn Castle* and hereditaments under a devise thereof to him in fee contained in the will of the said *Richard* Baron *Penrhyn*, and that the said *Richard* Baron *Penrhyn* acquired the fee simple and inheritance of and in the said premises under and by virtue of a common recovery alleged to have been suffered by him in the year 1782.

"15. The Plaintiff submits that any such recovery suffered was invalid at law, or at all events in equity, to defeat the estates limited over in case the said *Richard* Baron *Penrhyn* should die leaving no issue of his body lawfully begotten; and that such estates have, in fact, taken effect at law, or at all events in equity; and that the Plaintiff is now entitled as tenant in tail to the possession or the receipt of the rents and profits of the said undivided fourth part of the said *Penrhyn Castle* and hereditaments."

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C. A. 1877 DAWKINS v. LORD PENRHYN.

The Plaintiff claimed that the will of the testator might be established; that it might be declared that the Plaintiff was entitled to one undivided fourth of the property, to have possession delivered to him, and mesne profits.

The Defendant demurred, on the ground that the recovery was effectual, and also *ore tenus*, on the ground that the Plaintiff's title had been extinguished by the *Statute of Limitations*. Vice-Chancellor *Malins* allowed the demurrer, being of opinion that the recovery was good, and also that the *Statute of Limitations* could be raised by demurrer and was a good defence. The Plaintiff appealed.

Statement.

Higgins, Q.C., and *Oswald*, for the Appellant:—

Argument.

Richard Lord *Penrhyn* took his estate tail clothed with a trust, and a recovery by him was invalid in equity. A condition not to sell out of the family is good: *In re Macleay* (1).

[JESSEL, M.R.:—There was no estate tail in that case.]

Sackville West v. *Holmesdale* (2) is in our favour.

[JAMES, L.J.:—That was a case of an executory trust, and has no bearing on the present question.]

But supposing the recovery effectual, it is not pleaded, there being no allegation that it ever was suffered, but only that the Defendant says so, and that is not enough: *Egremont* v. *Cowell* (3); *White* v. *Smale* (4); *Hall* v. *Eve* (5). The *Statute of Limitations* cannot be raised by demurrer: *Catling* v. *King* (6); *Wakelee* v. *Davis* (7).

[JESSEL, M.R.:—Those are cases where the statute takes away the remedy but not the right.]

Rules of Court, 1875, Order XIX., rule 18, we submit, makes it necessary that the statute should be pleaded.

[Order XXVIII., rules 1, 2, were also referred to.]

Southgate, Q.C., and *Joshua Williams*, Q.C. (*Dart* and *W. Barber* with them), appeared for the Defendant, but were not called upon.

(1) Law Rep. 20 Eq. 186.
(2) Ibid. 4 H. L. 543.
(3) 5 Beav. 620.
(4) 22 Beav. 72.
(5) 4 Ch. D. 341.
(6) 5 Ch. D. 660.
(7) 25 W. R. 60.

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C. A. 1877 DAWKINS v. LORD PENRHYN. Judgment, Jessel, M.R.

JESSEL, M.R.:—

This is an appeal from a decision of Vice-Chancellor *Malins* allowing a demurrer to the statement of claim. As some technical points have been mentioned which of course not only apply to this case but to many others, I think it right to state my opinion upon them.

In the first place, the demurrer stated as a ground of law the effect of a common recovery to defeat the estate tail in *Richard* Baron *Penrhyn*. But at the Bar another ground was taken in addition, namely, the effect of the *Statute of Limitations*. It appears to me that the Respondents were clearly entitled to take that ground. The 2nd rule of Order XXVIII. says: "A demurrer shall state specifically whether it is to the whole or to a part, and if so, to what part, of the pleading of the opposite party. It shall state some ground in law for the demurrer, but the party demurring shall not, on the argument of the demurrer, be limited to the ground so stated."

The next technical point raised was that the *Statute of Limitations* could not be taken advantage of on demurrer. That appears to me to be founded on a misapprehension of the effect of the 18th rule of Order XIX., which was referred to. "Each party in any pleading not being a petition or summons, must allege all such facts not appearing in the previous pleadings as he means to rely on." That cannot refer to a demurrer, because no facts are alleged on a demurrer—in fact, a demurrer would be bad as being a speaking demurrer if it did allege facts; "and must raise all such grounds of defence or reply, as the case may be, as if not raised on the pleadings would be likely to take the opposite party by surprise,"—That does not apply to a demurrer, because there is special leave given by the rule I have read to take another ground on the argument of the demurrer—"or would raise new issues of fact not arising out of the pleadings, as, for instance, fraud, or that any claim has been barred by the *Statute of Limitations* or has been released." That clearly refers to a case where the remedy was taken away by the *Statute of Limitations* though the right remained, as was the case where simple contract debts were barred by the *Statute of Limitations*. Under the *Statute of Limitations* (3 & 4 Will. 4, c. 27), as regards real property, the case is quite

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different, the title itself is extinguished, and the right of action wholly disappears. That is not a bar of the claim, it is a divesting of title or a transfer of title to somebody else. If it appears on the face of the claim that the title which once was in the claimant has passed to somebody else, that is a good ground for demurrer. For that purpose I need only refer to the 1st rule of Order XXVIII., which says: "Any party may demur to any pleading of the opposite party, or to any part of a pleading setting up a distinct cause of action . . . . on the ground that the facts alleged therein do not shew any cause of action." Here the Defendant says: "Admitting your facts to be true, you have no cause of action; your cause of action has been destroyed by the statute, which says that if the action is not brought within a certain time your title shall be extinguished."

When we look at this statement of claim, it is plain that this defence is well founded. The case of the Plaintiff is one which can only arise by claiming under one "*Henry Dawkins* the son," who, it is alleged in the 9th paragraph of the statement of claim, became entitled as tenant in tail on the 25th day of October, 1852, when his father died, which is more than twenty years ago. Then it says: "The said *Henry Dawkins* the son died on the 13th day of November, 1864, leaving the Plaintiff his eldest son and heir-at-law him surviving, and the Plaintiff thereupon became and he still is entitled as tenant in tail under the said will to the possession, or the receipt of the rents and profits of the said one-fourth part of the said *Penrhyn Castle* and hereditaments." Now, if *Henry Dawkins* the son was tenant in tail, and the Plaintiff claims as issue in tail, if time began to run against *Henry Dawkins* the son it went on running against the present Plaintiff unless he was under some disability. As more than twenty years, therefore, had run from the 25th of October, 1852, before the commencement of this action, which was on the 8th of March, 1877, the Plaintiff's title is extinguished, unless what he alleges in the 12th paragraph will save him. Now all that he alleges is this: "The Plaintiff was ignorant of the trust or restriction on alienation contained in the will of the said testator until the month of February, 1875, when a copy of the will of the said testator was found and was handed to the Plaintiff. Prior to this date, viz., February, 1875,

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C. A. 1877 DAWKINS v. LORD PENRHYN. Judgment, Jessel, M.R.

the Plaintiff had never heard or known that any such will or any other will had ever been made or executed by the said testator, or that he, the Plaintiff, or his said father, *Henry Dawkins* the son, or his grandfather, *Henry Dawkins* the younger, was or had been entitled to any share or interest in the property devised thereby by virtue of any devise or limitation therein contained or otherwise." Then he says: "The Defendant entered into possession and the receipt of the rents and profits of the said one-fourth part of the said *Penrhyn Castle* and hereditaments upon the death of the said *George Hay Dawkins Pennant*, and the Defendant has since continued in such possession and receipt." *G. Hay Dawkins Pennant* is stated in the statement of claim to have died in 1840. So it clearly appears on the statement of claim that the Plaintiff, and his father before him, had been out of possession nearly twenty-five years when the action was commenced. The case is not within any of the exceptions in the *Statute of Limitations*. Ignorance does not prevent the operation of that statute, and there is nothing else alleged on the face of the statement of claim to prevent it. The statute, in my opinion, is a complete answer to the present statement of claim, and therefore the demurrer ought to be allowed on that ground.

I now come to the second ground. I so far agree with the argument on behalf of the Appellant, that I think there is no positive allegation of the suffering of the recovery. As I read the allegation, it is an allegation that the Defendant claims under the will of *Richard* Baron *Penrhyn*, and claims that Lord *Penrhyn* acquired the fee "under and by virtue of a common recovery alleged to have been suffered by him in the year 1782." I think there is no positive statement of the recovery, but at the same time I hope I may properly express my assent to some remarks which were quoted as having been made by Lord Justice *James* in a former case, in saying that no such allegation as this ought now to be inserted in a statement of claim, because it is not the province of a statement of claim to contain what old bills in Chancery did, a series of charges and counter-charges. A statement of claim ought to contain facts, and nothing else, therefore these allegations ought not to have been inserted, and might entrap the Defendant into thinking that they were intended as a statement of facts.

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But the argument proceeded before the Vice-Chancellor, and has to a great extent proceeded before us, on the question whether the recovery, if suffered, was valid; and inasmuch as it is desirable, whether the case goes further than this Court, or whether the case is to proceed in another shape, to express my opinion on that question, I shall do so in a few words. It is alleged that a gift to *A.* and the heirs of his body upon special trust and confidence in case he shall have no issue of his own body not to obstruct or cut off the subsequent limitations (for that is what it comes to), is a valid restriction on an estate tail which could not be defeated by a common recovery, or now by a disentailing deed. In order to consider the value of that argument, we must consider what the testator has done as regards the estate tail. He has chosen to give a legal and beneficial estate tail to the first taker, Lord *Penrhyn;* he has chosen to attempt to engraft upon that estate tail what, taking it at its best, is a clause of defeasance. If it is not a valid trust, if it is intended only as an expression of hope or desire not amounting to a testamentary disposition by the testator, then of course it would not be binding. But if it were to be considered as an attempt to create a valid trust, it would be a trust in defeasance of an estate tail, cutting it down to something less than an estate tail; one of the counsel has plainly said, cutting it down to an estate for life; but, whatever it is, it is a clause in defeasance of the estate tail. The way to try it is this: suppose, instead of the words that are after "upon special trust and confidence," we had these words, "but upon special trust and confidence in my said son that in case he shall leave no issue of his body he shall convey the estate to *John Smith*," could any one doubt then that the estate to *John Smith* was after the estate tail? If it is after the estate tail, whether it is in defeasance of the estate tail or whether it is in remainder after the estate tail, it was before the passing of the Act for the abolition of fines and recoveries liable to be destroyed by the tenant in tail suffering a recovery, and would now be liable to be destroyed by his executing a disentailing deed. In other words, the right of the actual tenant in tail to enlarge his estate to a fee simple cannot be restricted by any attempt on the part of the settlor or testator by inserting clauses either that he shall not exercise the right, or by defeating

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C. A. 1877 DAWKINS v. LORD PENRHYN.

the estate tail in case he exercises the right. And that, as I understand it, is the effect of all the authorities.

The result will be, therefore, that I entirely agree with the conclusion which the Vice-Chancellor has come to on this part of the case, assuming that the facts of a recovery having been suffered had been properly pleaded. I am of opinion, therefore, that his decision should be affirmed.

Judgment, James, L.J.

JAMES, L.J.:—

I am of the same opinion. It appears to me quite clear that the words "upon special trust and confidence" have no magical power, and that they are only a mode of indicating the testator's wish, intention, and injunction, that the son should not suffer a common recovery. Apparently the testator did not intend to restrict his son (which is rather odd) from levying a fine which would have barred his issue if he had issue, but only from suffering a common recovery. Now, if there is one thing that has been settled beyond all question in the real property law of this country, it is that no condition, no restriction, no prohibition, no limitation over can prevent a tenant in tail from suffering a common recovery with all its consequences; and it appears to me to be perfectly immaterial whether the conveyance uses one form of words or another whether he says, "I forbid him from suffering a common recovery," or "I trust in him," or "I confide in him that he will not suffer a common recovery," or "I request him not to do it," or whether he puts in the words "on special trust and confidence," they all have the same meaning, that is to say, they indicate the intention of the settlor or testator that the estate tail shall not be barred. The law of the land says that it is barrable, and in that respect an estate tail is higher that an estate in fee simple, because when once a man has got an estate tail vested in him he can get rid of any limitation or condition over, which is not the case with regard to a tenant in fee simple. A tenant in fee simple may have an estate liable to a defeasance, either by an executory devise if he takes under a will, or by a shifting use if he takes under a limitation to uses.

In the present case there is a plain estate tail. It is suggested it might be possibly cut down to an estate for life; but I do not

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know how that is to be done. If *Richard* Lord *Penrhyn* had died leaving a son, could any one doubt that that son would have been tenant in tail, not by way of purchase, but as issue in tail of his father? It appears to me to be beyond all doubt that this was an estate tail, and that the testator could not, either by language of trust or by any other language, effectually restrain the tenant in tail from exercising his power of suffering a common recovery.

It appears to me with regard to the other points that they are purely technical, and that this statement of claim was originally framed in order to raise this very point upon claim and demurrer; for if not, I cannot conceive why the 14th and 15th clauses were inserted. If there was no doubt that a common recovery had been duly suffered, and the only question was whether that common recovery was valid, having regard to the special words in the will, it was right to raise the point in such a way that it could be tried upon demurrer. On this statement of claim, however, it was quite open to the Plaintiff to say, "I have not admitted the common recovery." I am very glad to find that to that technical objection there is the answer that the *Statute of Limitations* is fatal to the Plaintiff's case.

I am of opinion that the order of the Vice-Chancellor ought to be affirmed.

BAGGALLAY and COTTON, L.JJ., concurred.

Solicitors: *Guscotte, Wadham, & Daw; C. F. Hore.*

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C. A.
1877
July 19.

Ex parte WADDELL. *In re* LUTSCHER.

Witness—Expenses—Costs—Fees to Counsel—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 96—*Bankruptcy Rules*, 1870, *rr.* 170, 186.

A mere witness summoned for examination under sect. 96 of the *Bankruptcy Act*, 1869, is not entitled to the costs of employing a solicitor or counsel.

The managing director of a company in which a liquidating debtor had held some shares, which had been forfeited, was summoned by the trustee in the liquidation under sect. 96 for examination, with the view of obtaining information for the purpose of impeaching the validity of the forfeiture. He attended at the time appointed, and two counsel were present on his behalf, but, as the trustee's counsel did not attend, the examination was adjourned *sine die*, with costs to be paid by the trustee.

Held (reversing the decision of the Registrar), that the witness was only entitled to the ordinary allowance for his expenses, and not to the costs of his solicitor or the fees paid to his counsel.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, sitting as Chief Judge in Bankruptcy.

In the liquidation of *Peter Lutscher* a question arose whether some shares which he had held in the *Standard Discount Company* had been duly forfeited by the company. The trustee applied to the Court of Bankruptcy under sect. 96 of the *Bankruptcy Act*, 1869, for leave to summon Mr. *W. F. Blockey*, the managing director of the company, for examination with reference to the matter. A subpœna was issued requiring his attendance before the Registrar on the 13th of April, 1877. He attended on that day, and his examination was commenced, but was not concluded, and the Registrar directed an adjournment to the 1st of May. The trustee paid the witness £1 1*s.* for his expenses. A subpœna was issued for his attendance again on the 1st of May, and he attended, and two counsel attended on his behalf to watch the proceedings. The counsel for the trustee, however, were not present at the time appointed, and, after waiting some time, the Registrar adjourned the meeting *sine die*, and ordered that the trustee should pay the costs of and occasioned by the adjournment. The trustee paid the witness £1 1*s.* for his expenses. The bill of costs of the witness was carried in for taxation. The bill included, "Instructions for

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brief, Attending the witness, Fees to counsel, Attending Court, &c." The Taxing Master disallowed all the items except one of 5*s.* for the witness's cab hire.

Statement.

Application was made to the Registrar to review the taxation, and he on the 5th of June ordered the bill of costs to be referred back to the Taxing Master, with a declaration that the costs directed to be paid by the order of the 1st of May should also include any extra costs, either by instructing counsel or otherwise, occasioned by the adjournment. The trustee appealed.

Argument.

Roxburgh, Q.C., and *Warmington*, for the Appellant:—

This is the first time a witness has ever been allowed the costs of employing counsel. It is only a matter of indulgence to allow counsel to be present on his behalf. The Registrar thought that rule 186 of the Bankruptcy Rules, 1870, gave him power to give these costs (1). But there was no matter before the Court. *Blockey* was only a witness being examined for the purpose of obtaining information from him in order that it might be used against the company. Rule 170 (2) only applies as between the parties.

[They were stopped by the Court.]

Winslow, Q.C., and *Crump*, for *Blockey*:—

The witness was summoned as a director of the company, and to produce its books. The avowed object was to obtain evidence in support of an action in the Chancery Division to have the forfeiture declared invalid. This was really a step in the litigation in the Chancery Division, the Court of Bankruptcy being used in aid of it, and *Blockey* was there to defend the forfeiture. He ought to be protected as if he was a Defendant.

[JAMES, L.J.:—The company will get their costs when they are sued if they are successful.]

Rule 186 gives the Court power to award these costs. There was in substance a litigation pending between the trustee and the

(1) Rule 186 provides that "The Court may in all matters before it award such costs as to it shall seem fit and just."

(2) Rule 170: "The costs of witnesses, whether they have been examined or not, may, in the discretion of the Court, be allowed."

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C. A. 1877 — *Ex parte* WADDELL. *In re* LUTSCHER.

company. This is an appeal from an exercise of the Judge's discretion on a question of costs. The costs incurred by the employment of counsel were thrown away through the trustee's default.

[They referred to 6 Geo. 4, c. 16, s. 35; 12 & 13 Vict. c. 106, s. 250; *In re Leighton and Benett* (1).]

Judgment, James, L.J.

JAMES, L.J.:—

I think that the Registrar's order was made improvidently, without due consideration of the position of the witness. There really does not seem to be any doubt about the matter when one comes to consider it. We have heard a great deal about the provisions of the Act and the Rules, about the hardship of costs not being allowed, and the reasonableness of the witness being paid the costs of his attendance. In answer to these observations, there is this one—that the Act did not intend that a witness who was to be examined under sect. 96 should come to the place of examination armed with two counsel. Every witness, I take it, who is summoned for examination is entitled to his reasonable expenses, but that is all. No doubt in the present case the company thought it necessary or advisable for their interests that a person standing in the peculiar position towards them of this witness should be protected, and they therefore took the course, which I cannot help thinking is somewhat unusual, of instructing two counsel to attend his examination. Those counsel accordingly attended, and watched the evidence which was given, and no doubt duly weighed the importance of what was said, just in the same way as the counsel of any suitor in the Court would weigh any evidence which was being given material to his interests. Mr. *Blockey* was not a suitor in the ordinary sense; he was merely a witness called to give evidence. No doubt he happens to be the servant of the company, and no doubt it was possible he might give evidence which would very materially affect the company's interests. The fact is undisputed that he was not only a servant of the company, but that he held a high and confidential position towards them. He was called and examined, and it can really make no difference for the present

(1) Law Rep. 1 Ch. 331.

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purpose whether he was examined as a witness in the liquidation proceedings or in any other proceeding. He was summoned under sect. 96; he was bound to give evidence, and, considering the position he held towards them, the company thought it advisable to instruct counsel to attend his examination. That course appears to have been taken by them entirely of their own accord, no right to do so being given them by the Act. This is not the case of a man who is charged with having property in his possession belonging to a bankrupt and is summoned to give evidence respecting it. In such a case it might possibly be said that there was a litigation between him and the trustee, and that he was entitled to be protected by counsel. The circumstances of the present case are quite different. I think that the order of the Registrar is wrong, and that it must be discharged.

Judgment, James, L.J.

BAGGALLAY, L.J.:—

Baggallay, L.J.

It has been said that the Court of Appeal will not interfere in a matter involving the discretion of the Judge, or on a question of costs. There have, however, been cases of that kind in which the Court of Appeal has interfered, although I do not say that it would do so in every case, and it is abundantly clear that the Court has the power to interfere. *Primâ facie*, all that this witness was entitled to was £1 1*s.* a day for his expenses and his cab hire, and this was paid or was allowed by the Taxing Master. I think that he made the right allowance. The witness was a servant of the company. The counsel did not represent him, they represented the absent company. I can see no possible reason for allowing these costs, and I agree that the decision of the learned Registrar must be reversed.

COTTON, L.J.:—

Cotton, L.J.

I am entirely of the same opinion. Really the only question is, to what a witness, not being a person against whom any allegation is made with regard to the bankrupt's property, or against whom any proceeding is intended to be taken, but who is examined as a mere witness because it is supposed he can give evidence with regard to property which was at some time or other in the possession of the bankrupt, is entitled as his reasonable

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C. A. 1877. *Ex parte* WADDELL. *In re* LUTSCHER. Judgment, Cotton, L.J.

expenses. There can be no doubt he is entitled to his reasonable expenses, and the whole question is whether the expenses charged in this case were reasonable. Although a witness may be entitled to have counsel present to protect him, he must retain such counsel at his own expense. And a mere witness summoned under this section cannot be allowed costs which he would not have if summoned as a witness in any litigation. The case of *In re Leighton and Benett* (1), which has been referred to, was different in its facts from the present case. There the person summoned was the clerk of certain persons against whom an adjudication of bankruptcy was prayed, and he stated that he had no possession of their books, and the order of the Commissioner for the production of the books by him was discharged on appeal, and the object of the summons having failed, it was perfectly right that the witness should have his costs. That decision can have no application to the subject of costs incurred by a witness in the way in which they have been incurred in the present case.

Solicitor for Trustee: *A. G. Ditton.*
Solicitors for witness: *Argles & Rawlins.*

C. A. 1877 *July* 19.

Ex parte REYA. *In re* SALINGER.

Execution Creditor—Trader—Action for Debt above £50—Abandonment by Plaintiff of Part of his Claim—Judgment signed for less than £50—Bankruptcy before Sale by Sheriff—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 87.

A creditor who has sued a trader for a debt exceeding £50 is entitled to abandon part of his claim, and to sign judgment for a sum less than £50, so as to avoid the operation of sect. 87 of the *Bankruptcy Act*, 1869.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, sitting as Chief Judge in Bankruptcy.

On the 1st of May, 1877, *Charles Reya* commenced an action in the Exchequer Division against *Morris Salinger*, a wholesale furrier, to recover £53 5*s.*, due upon a bill of exchange accepted by *Salinger*, with interest and costs. The Defendant did not

(1) Law Rep. 1 Ch. 331.

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C. A. 1877 *Ex parte* REYA. *In re* SALINGER.

appear, and on the 16th of May the Plaintiff signed judgment for £44 6*s*., and costs taxed at £3 14*s*., making together £48. On the same day the Plaintiff issued a writ of execution, and the sheriff seized some goods of *Salinger*. The writ was indorsed "Levy £48 and no more." On the 19th of May *Salinger* filed a liquidation petition, a receiver was appointed, and an interim injunction was granted by the Court of Bankruptcy, restraining *Reya* and the sheriff from taking any further proceedings upon the judgment until after the 26th of May. On the 26th of May the injunction was continued until after the 10th of June, but expressly without prejudice to the rights of the execution creditor. On the 6th of June the first meeting of the creditors under the petition was held, and a liquidation by arrangement was resolved upon, and a trustee appointed. On the 8th of June, upon the application of the trustee, the Registrar made the injunction perpetual, and ordered the sheriff to withdraw from possession. *Reya* appealed.

Statement.

Finlay Knight, for the Appellant:—

Argument.

The Registrar proceeded on the ground that the abandonment of a part of the debt was a scheme to evade sect. 87. But no collusion was suggested, and indeed the application for the injunction was made in the first instance by the debtor himself. A creditor has a right to abandon a part of his debt, and sect. 87 does not apply, for the goods have not been taken in execution "in respect of a judgment for a sum exceeding £50." The amount for which the levy can be made is the material thing: *Ex parte Liverpool Loan Company* (1). There is nothing wrong in evading the provisions of an Act: *Ramsden* v. *Lupton* (2).

Daniel Jones, for the trustee:—

Though there may have been no collusion, yet this is a device which the Court will not sanction. If it were permitted to succeed, the result would be that in many cases sect. 87 would be nullified. In construing the section the Court will have regard to its general intention, and will endeavour to construe it liberally for the benefit of the general body of the creditors. *Ex parte Sims* (3) shews

(1) Law Rep. 7 Ch. 732. (2) Law Rep. 9 Q. B. 17.
(3) 4 Ch. D. 521, 523.

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C. A. 1877 *Ex parte* REYA. *In re* SALINGER. Argument.

what the intention is. Sect. 73 of the *Bankruptcy Act*, 1861, throws some light upon the construction. There the words were "upon any judgment recovered in any action personal for the recovery of any debt or money demand exceeding £50." The present case would have been literally within those words. The object of the Legislature in altering the words was to enlarge the protection of the general creditors. The words of sect. 87 may be fairly read as meaning "in respect of a judgment in an action for a sum exceeding £50."

Judgment, James, L.J.

JAMES, L.J.:—

In my opinion a man has a right to abandon a part of his debt. There is nothing in the Act to prevent his doing so. It is said that this section ought to be liberally construed in favour of the general body of creditors. But both the execution creditor and the general body of creditors have rights given to them by the Act, and what those rights are must be determined by the Act. I can see no reason why we should deprive a man of the rights which are given or preserved to him by the Act in order that we should give what is called a liberal construction to the Act for the benefit of the other creditors. The words of sect. 87 are plain. "Where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding £50 and sold," the sheriff is to retain the proceeds of sale in his hands for fourteen days, and if he receives notice within that period of a bankruptcy petition having been presented against the trader, he is to hold the proceeds of sale, after deducting expenses, on trust to pay the same to the trustee. Here the judgment has been signed, and the levy has been made, for a sum less than £50. Therefore sect. 87 does not apply.

Baggallay, L.J.

BAGGALLAY, L.J.:—

If we are to have regard to the words of sect. 73 of the Act of 1861, I should draw from them an inference contrary to that which Mr. *Jones* asks us to draw. I think we must assume that the change which the Legislature has made in the language was made intentionally and with the view of rendering it essential that the

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sum for which the levy is made, and not the sum for which the action is brought, should exceed £50.

C. A. 1877 *Ex parte* RETA. *In re* SALINGER.

Judgment, Cotton, L.J.

COTTON, L.J. :—

The question is purely one of the construction of sect. 87, and on the fair construction of that section I think that the present case does not come within it. There is no reason for depriving the creditor of the fruits of his judgment.

Solicitor for Appellant: *J. N. Mason.*
Solicitors for Trustee: *Allen & Edwards.*

Ex parte PANNELL. *In re* ENGLAND.

C. A. 1877 *July* 19.

Court of Bankruptcy—Jurisdiction—Discretion—Foreclosure Action by Equitable Mortgagee—Validity of Mortgage denied by Trustee—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 72.

An equitable mortgagee by deposit of title deeds of a bankrupt commenced in the Chancery Division an action against the trustee in the bankruptcy for an account and foreclosure in default of payment. The trustee, who alleged that nothing was due on the mortgage, but that it had been concocted to defeat the bankrupt's creditors, examined the mortgagee and other witnesses in the Court of Bankruptcy, and applied to that Court (after the commencement of the action) for an order for delivery up of the title deeds by the mortgagee :—

Held, that the Registrar was right in making an order dismissing this application, with liberty to either of the parties to apply after the conclusion of the proceedings in the action.

Observations on the jurisdiction of the Court of Bankruptcy under sect. 72 of the *Bankruptcy Act*, 1869.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, sitting as Chief Judge in Bankruptcy.

On the 8th December, 1874, *P. N. England* was adjudicated a bankrupt. *M. Banes* and *W. H. Pannell* were afterwards appointed trustees of his property. On the 6th of April, 1877, *W. Barns* commenced in the Chancery Division an action of *Barns* v. *Banes* against the trustees. The statement of claim, delivered on the 26th April, alleged that on the 11th June, 1873, the bankrupt had deposited with the Plaintiff the title-deeds of certain leasehold and freehold premises belonging to him, and had

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Statement.

signed a written memorandum, charging his interest in the property with the repayment of £1000 and interest, and undertaking to execute a legal mortgage when required. The Plaintiff claimed an account of what was due to him for principal and interest; an order on the Defendants for payment; foreclosure in default of payment; that if necessary the Defendants might be ordered to execute a legal mortgage of the property to the Plaintiff; the appointment of a receiver, and an injunction. By their statement of defence, delivered on the 12th of June, 1877, the trustees alleged that the memorandum of charge was made only for the purpose of defeating and delaying the creditors of *England*, and in fraud of the creditors, and that nothing was due to the Plaintiff. On the 31st of May, 1877, the trustees gave notice of motion in the Court of Bankruptcy, for an order declaring that they were entitled as against *Barns* to the premises comprised in the memorandum of charge, and that *Barns* might be ordered to deliver up to them the title-deeds, and to pay the costs of the application. On the 14th of June the Registrar dismissed the motion with costs, with liberty to either of the parties to apply after the conclusion of the proceedings in the action in the Chancery Division. The trustees appealed.

Argument.

Ince, Q.C., and *F. Turner* (*E. C. Willis* with them), for the Appellants:—

The matter in question would be much more conveniently disposed of in the Court of Bankruptcy, which, under sect. 72 of the Act of 1869, has full jurisdiction, and can do complete justice, and make a complete distribution of property. If the action is allowed to go on the proceedings in the bankruptcy will be stopped until it is decided. This may not be done for years. *Barns* has been examined in the Court of Bankruptcy, and that Court has every material before it for coming to an immediate decision. In *White* v. *Simmons* (1) it was admitted that something was due to the mortgagee, and even then Lord *Hatherley* allowed the appeal with reluctance. Here the alleged mortgage debt is denied altogether by us. We say that the security is a mere sham, concocted to defraud the other creditors. That being

(1) Law Rep. 6 Ch. 555.

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so, the rights of the Plaintiff as a secured creditor are not preserved by sect. 12 of the *Bankruptcy Act.*

[JAMES, L.J.:—He has a *de facto* security which you are seeking to set aside. He has selected, as he is legally entitled to do, the Court which can give him foreclosure. You can raise your case as a defence to the action].

The trustee in the bankruptcy has a right to ask the Court of Bankruptcy to exercise its jurisdiction under sect. 72, and in *Ex parte Ditton* (1) Lord Justice *James* said: "There is no doubt, whatever that the jurisdiction of the Court of Bankruptcy to restrain proceedings in other Courts still exists." The intention of the Legislature was that the estates of bankrupts should be administered in the Court of Bankruptcy. The mortgagee's action ought not to interfere with the trustees' right to realize the bankrupt's estate in the most expeditious and economical way.

[JAMES, L.J.:—In *In re Motion* (2) Lord *Selborne* said that sect. 72, "does not enable the Court of Bankruptcy to draw compulsorily within the sphere of its jurisdiction property, or the owners of property, not vested in the assignee, and not originally subject to the administration in bankruptcy."]

This is only an equitable mortgage, and the trustees are actually in possession of the property.

Roxburgh, Q.C., and *Robson*, for the mortgagee, were not heard.

JAMES, L.J.:—

I am of opinion that the order of the Registrar was quite right. It was not the intention of the Act that the Court of Bankruptcy should draw within its jurisdiction all property that may be claimed as against the trustee of a bankrupt by a third party. There are proper tribunals for the determination of such questions. Where there is a question like this, which goes to the very root of the title of a man who claims to be the owner of property under a mortgage from a bankrupt, and which he in the exercise of his legal right has brought before the Chancery Division of the High

(1) 1 Ch. D. 560. (2) Law Rep. 9 Ch. 192, 210.

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C. A. 1877

Ex parte PANNELL. *In re* ENGLAND.

Judgment, James, L.J.

Court, we have no power to withdraw it from the jurisdiction of that Court. And it would be monstrously inconvenient that two proceedings in relation to the same matter should be going on at once in two different Courts. It is said that the proceedings in the Court of Bankruptcy are much quicker and cheaper. According to my experience they are in many cases both expensive and dilatory. If this argument is well founded it would apply to bankruptcy proceedings commenced in a County Court, in which case there might be an appeal from the County Court to the Chief Judge, and then an appeal from the Chief Judge to this Court. That would not be a very economical or expeditious proceeding. I am of opinion that this equitable mortgagee had a right to bring his action in the Chancery Division of the High Court, and that we cannot withdraw the case from its jurisdiction.

Baggallay, L.J. BAGGALLAY, L.J.:—

I am of the same opinion. In *Ex parte Ditton* (1), which was cited as in favour of the Appellant's view, the question was merely whether the *Judicature Act* had taken away the power of the Court of Bankruptcy to restrain proceedings in other Courts, and it was with reference to that question that Lord Justice *James* made the observations which have been read by Mr. *Ince*.

No doubt that jurisdiction of the Court of Bankruptcy still exists, and the only question raised or dealt with in *Ex parte Ditton* was what was the effect of the *Judicature Act*.

Cotton, L.J. COTTON, L.J.:—

I am of the same opinion. I do not say whether under sect. 12 of the *Bankruptcy Act* the mortgagee has an absolute right to continue his proceedings in the High Court. But if the Court of Bankruptcy has a discretion under sect. 72, whether it will decide the question in dispute or leave it to the decision of the Chancery Division, I think that that discretion has been properly exercised in refusing to decide it when there was this action pending. There is nothing in the *Bankruptcy Act* which compels the Court of Bankruptcy to decide the question rather than leave it to be

(1) 1 Ch. D. 560.

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decided in the ordinary tribunal, and I see no reason why we should deprive the mortgagee of his right to have his case decided in the ordinary tribunal.

C. A. 1877 *Ex parte* PANNELL. *In re* ENGLAND.

Solicitor for Trustees: *W. F. Stokes.*
Solicitor for Mortgagee: *A. Abrahams.*

In re DAVID LLOYD & CO.
LLOYD *v.* DAVID LLOYD & CO.

[1876 L. 182.]

C. A. 1877 V.-C. M. *May* 29. C. A. *July* 25.

Company—Winding-up—Leave to proceed with Action—Foreclosure Action by Mortgagee—Companies Act, 1862 (25 & 26 *Vict.* c. 89), *s.* 87.

When an order has been made to wind up a company, a mortgagee who has commenced an action against the company to realize his security ought to have leave, under sect. 87 of the *Companies Act*, 1862, to proceed with his action, except under special circumstances, or unless the same relief is given to him in the winding-up as he would obtain in the action.

Statement.

DAVID LLOYD & Co., Limited, was a company registered on the 2nd of August, 1873, under the *Companies Acts*, 1862 and 1867. It was formed for the purpose of purchasing and working some collieries situate in *Carmarthenshire* and *Glamorganshire* of which *David Lloyd* was the lessee. He agreed to sell his interest in the collieries to the company for £60,000, of which £10,000 was to be paid at once in cash, and £10,000 in shares of the company. The remaining £40,000 was to be paid in instalments spread over a number of years. On the 2nd of August, 1873, *Lloyd* was appointed consulting director of the company at a yearly salary of £250, and he continued to act in that capacity until the company resolved upon a voluntary winding-up, as will be presently stated.

By an indenture dated the 18th of December, 1873, *David Lloyd* assigned to the company his interest in the collieries, but subject to the equitable mortgage created by the deposit with Messrs. *J. Prothero Lewis & Son*, as the solicitors and on behalf of *Lloyd*, of the leases and other title-deeds of the premises thereby

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C. A. 1877 — *In re* DAVID LLOYD & Co. — LLOYD v. DAVID LLOYD & Co. — Statement.

assigned for securing to *Lloyd*, his executors, administrators, and assigns, the payment of the sum of £40,000 for unpaid purchase-money. The deeds were accordingly deposited by the company with *Lloyd's* solicitors as security for the repayment to him of the £40,000, and subject thereto in trust for the company. On the 15th of July, 1876, at an extraordinary meeting of the shareholders of the company, it was resolved that it was proved to the satisfaction of the company that the company could not by reason of its liabilities continue its business, and that the company be accordingly dissolved and wound up voluntarily, and liquidators were appointed. At this time £30,000 still remained due to *Lloyd*. On the 1st of August, 1876, *Lloyd* commenced an action in the Chancery Division of the High Court against the company, claiming an account of what was due to him for principal and interest on his security, and that in default of payment the Defendants might be foreclosed of the equity of redemption in the mortgaged premises. On the 27th of April, 1877, upon the petition of a creditor for a compulsory winding-up order, an order was made by Vice-Chancellor *Malins* that the voluntary winding-up of the company should be continued subject to the supervision of the Court. On the 14th of May the Plaintiff gave notice of motion in the winding-up and in the action, for an order that he might be at liberty to proceed with the action notwithstanding the supervision order. The motion was heard on the 29th of May, 1877.

Glasse, Q.C., and *Snape*, for the Plaintiff.

Higgins, Q.C., and *Russell Roberts*, for the liquidators.

Judgment, V.-C. M.

MALINS, V.C.:—

There having been the order made to wind up under supervision, this application is made for liberty to continue the action under the 87th section of the *Companies Act*, 1862, which provides, "When an order has been made for winding up a company under this Act, no suit, action, or other proceeding shall be proceeded with or commenced against the company except with the leave of the Court, and subject to such terms as the Court may impose." It is therefore upon the words of sect. 87 purely a matter of discretion whether the

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Court will give leave to proceed, and that discretion, I think, must be exercised according to the circumstances of each case brought before the Court. I have said during the course of the argument that if Mr. *Lloyd* had stood in the position of an ordinary vendor of this colliery, simply selling to a number of persons, having had no connection with the formation of the company or with its conduct, I should adopt the course which I adopted in *Thames Plate Glass Company* v. *Land and Sea Telegraph Construction Company* (1), where I made an order, which was afterwards confirmed on appeal, allowing a suit to go on. If Mr. *Lloyd* had been in the ordinary position of a vendor, I think he would have been entitled to say, "I have not been paid my purchase-money, and I must have the property." But I must look at all the circumstances of the case. This has been a very unfortunate company. If I allow Mr. *Lloyd* to go on with the action, there is nobody who can redeem him, and he must necessarily have a decree for foreclosure, the consequence of which would be to exclude the company from any interest in the property he has sold to them, and has led them to believe would be a source of prosperity to them. He will get it back for £30,000, and the company will not have a farthing. Now in exercising this discretion I must see whether I cannot protect Mr. *Lloyd* and protect the company at the same time. If I can effectually protect Mr. *Lloyd*, and also give the company the chance of getting something out of the property, I think it is my duty to do so. If Mr. *Lloyd* be, as I take him to be, a *bonâ fide* vendor, he is entitled to have his purchase-money, and he must have it if possible. Therefore, if I allow the colliery to be disposed of in the winding-up, I can effectually protect Mr. *Lloyd* by giving him leave to bid. If the colliery shall eventually be worth £40,000, then it will pay Mr. *Lloyd* his £30,000, and there will be £10,000 for the shareholders. If, on the other hand, the colliery produces only £20,000, and I give Mr. *Lloyd* liberty to bid, then he will get this property back for £20,000, and stand a creditor against the company for the balance of £10,000. Therefore I think everything will be done that Mr. *Lloyd* can properly desire if I allow him to go in and bid in the winding-up, and give him the benefit of having the property realized there.

(1) Law Rep. 6 Ch. 643.

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C. A. 1877 *In re* DAVID LLOYD & Co. — LLOYD *v.* DAVID LLOYD & Co. — Judgment, V.-C. M.

Mr. *Glasse* asks who is to pay the expenses of the sale. If I find the company is in such a situation that it cannot pay them, there may be a very good reason for my withdrawing this embargo hereafter. I think the company must indemnify Mr. *Lloyd* against the expense of putting up the property for sale. Then Mr. *Glasse* says if he does not get his decree for foreclosure, the landlord may come down and expel everybody. That may be so, but he cannot get the decree for foreclosure for at least a year, and all these disasters may occur in the meantime. It does not seem to me that the going on with the foreclosure suit will give either Mr. *Lloyd* or the company any effectual protection, and I think I shall properly exercise my discretion by refusing to give leave for the action to proceed, which will have the effect of leaving the property to be disposed of in the winding-up. The costs of the motion will be costs in the winding-up.

C. A.

From this decision *Lloyd* appealed. The appeal was heard on the 25th of July.

Argument.

Glasse, Q.C., and *Snape*, for the Appellant:—

The Vice-Chancellor ought not to have refused leave to proceed with the action without giving the Appellant the same relief in the winding-up as he would have obtained in the action. He ought at any rate to have made an immediate order for sale, and to have made provision for the costs of the sale. If the company wish for a sale it should be conducted at their expense, and a sum should be deposited to answer the costs. *Lloyd* was in no sense a promoter of the company; the sale to the company was made *bonâ fide*. He remains liable to the landlord for the rent and the performance of the covenants of the lease. In *In re St. Cuthbert Lead Smelting Company* (1), leave was refused to a mortgagee to institute a foreclosure suit against a company after a winding-up order had been made, but there Lord *Romilly*, M.R., said that the proper relief could be given at once in the winding-up. It is in truth only the surplus value of the colliery after paying the mortgage debt which is the property of the company.

[JESSEL, M.R.:—In bankruptcy you would have the right to

(1) 35 Beav. 384.

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enforce your security by foreclosure, and now, by virtue of sect. 10 of the *Judicature Act*, 1875, the law as to secured creditors is the same in winding-up as in bankruptcy. The *Companies Act*, so far as it is inconsistent with the law of bankruptcy, is repealed.]

Higgins, Q.C., and *Russell Roberts*, for the liquidators:—

We offered to abide by any order the Vice-Chancellor might make in Chambers, and he thought it would be better to dispose of the whole matter in the winding-up.

[JESSEL, M.R.:—You must necessarily abide by any order of the Court. Your offer was of no value.]

The Plaintiff has no absolute right to go on with his action; the Court has a discretion under sect. 87, and the Court of Appeal will not interfere with the exercise of the Vice-Chancellor's discretion: *Thames Plate Glass Company* v. *Land and Sea Telegraph Construction Company* (1). All proceedings against the company ought to be stayed when there is only a limited fund for payment of the creditors.

[JESSEL, M.R.:—Are you willing to submit to an immediate order for sale and to deposit £100 for costs?]

We have no authority to do this.

Judgment, C. A. Jessel, M.R.

JESSEL, M.R.:—

The real question is on what terms leave ought to be given to a mortgagee to proceed with or commence an action against a company for realizing his security when the company is being wound up, either compulsorily or under a supervision order.

Now, as a rule, a mortgagee has a right to realize his security, and of course, as incidental to that, a right to bring an action for foreclosure. Those who say that he should be restrained from bringing or proceeding with such an action must either shew some special ground for restraining him, or must say, "We can offer the mortgagee all he is entitled to, foreclosure or sale, as the case may be, at once, without any proceeding in the action." That, of course, would be a reason for refusing leave to proceed with an action if commenced, or for not giving leave to commence a

(1) Law Rep. 6 Ch. 643.

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Judgment, C. A. Jessel, M.R.

threatened action. But, short of that, it appears to me that the Court ought not under the 87th section of the Act to interfere with the rights of a mortgagee.

In the present case there are no special circumstances whatever which make it inequitable for the mortgagee to prosecute his action, and no terms, either reasonable or unreasonable, are suggested on the part of the official liquidator for putting an end to it. That being so, it appears to me that the order of the Vice-Chancellor must be discharged, and that leave must be given to the Plaintiff to proceed with his action.

James, L.J. JAMES, L.J.:—

I am entirely of the same opinion. These sections in the *Companies Act*, and the corresponding legislation with regard to bankrupts, enabling the Court to interfere with actions, were intended, not for the purpose of harassing, or impeding, or injuring third persons, but for the purpose of preserving the limited assets of the company or bankrupt in the best way for distribution among all the persons who have claims upon them. There being only a small fund or a limited fund to be divided among a great number of persons, it would be monstrous that one or more of them should be harassing the company with actions and incurring costs which would increase the claims against the company and diminish the assets which ought to be divided among all the creditors. But that has really nothing to do with the case of a man who for the present purpose is to be considered as entirely outside the company, who is merely seeking to enforce a claim, not against the company, but to his own property. The position of a mortgagee under such circumstances is, to my mind, exactly similar to that of a man who said, "You the company have got property which you have taken from me; you are in possession of my property by way of trespass, and I want to get it back again." A landlord might say, "You have property under lease from me; you have broken the covenants of the lease, and I have a right of re-entry in consequence of that breach." The company ought not, because it has become insolvent or has been minded to wind up its affairs, to be placed in a better position than any other lessee with regard to his lessor. So with regard to a mortgagee. The mortgagee says,

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"There is some property upon which I have a certain specific charge, and I want to realize that charge. I have nothing to do with the distribution of your property among your creditors, this is my property." Why a mortgagee should be prevented from doing that I cannot understand. Power was given to the Court to interfere with actions by restraining them or not allowing them to proceed, but this power was given because it was understood that the Court would exercise it with a due regard to the rights of third persons, persons who were not members of the company, and who had not to come in and claim to share in the distribution of the company's assets among the creditors, and who were not therefore *quasi* parties to the winding-up proceedings. The Court would have due regard to the rights of independent persons. A mortgagee is, to my mind, such an independent person, and his rights ought not to be interfered with because his mortgagors have chosen to become insolvent and to have a winding-up. I am of opinion that the action ought to proceed, unless, indeed, the whole thing being under the control of the Court, the Court is able to say, We, on behalf of the company which is being wound up, will without further litigation of any kind give you all which you are entitled to have. The Court may say on behalf of the company, We accede to your terms, and will give you your right at once. It is competent to the Court to do that, but it is not, as it appears to me, right for it to interfere with a mortgagee's taking the proper legal means for realizing that which is his own property.

COTTON, L.J.:— Cotton, L.J.

I am of the same opinion. The 87th section of the *Companies Act* stays all actions against the company after the winding-up order is made, unless the Court gives leave that they should go on. That is a very useful provision, because then, of necessity, the question comes before the Court, whether, under the circumstances, the action should be allowed to proceed. The present action is brought by a mortgagee to enforce his security. Certainly in a bankruptcy a mortgagee stands in a somewhat favoured position, because under sect. 12 of the *Bankruptcy Act* he has a right after adjudication to go on with his foreclosure action in

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C. A. 1877 *In re* DAVID LLOYD & Co. — LLOYD *v.* DAVID LLOYD & Co. — Judgment, C. A. Cotton, L.J.

order to realize his security. Other creditors who are not mortgagees are not in such a favoured position. Why in the case of a winding-up of a company a mortgagee should be in a worse position I cannot see. And as the liquidators in the present case do not offer to put the mortgagee in the same position in which he would be when he obtains a judgment in his action, but suggest that there are questions which may prevent his having the right upon which he insists, and to enforce which he brought the action, I am of opinion that these questions will be much better tried in the action, and that there is no ground for refusing the mortgagee leave to proceed with his action.

Solicitors for Mortgagee; *G. L. P. Eyre & Co.*, agents for *J. P. Lewis, Llandilo.*

Solicitors for Liquidators: *Tucker & Lake*, agents for *Wragge, Evans, & Holliday, Birmingham.*

C. A. 1877 *Aug.* 1.

In re ELSOM.
THOMAS *v.* ELSOM.

[1876 E. 105.]

Practice—Appeal from Order made in Chambers—Certificate of Judge.

An order made by a Judge of the Chancery Division personally in Chambers may be appealed from equally with an order made by him in Court.

As a general rule, however, a certificate should be obtained from the Judge that he does not desire to hear any further argument in Court. But the object of such a certificate is only to satisfy the Court of Appeal that the Judge has judicially determined the matter, and, if otherwise satisfied of that fact, the Court of Appeal will hear the appeal without a certificate if the Judge declines to give one. Application should, in such a case, be made to the Court of Appeal for leave to set down the appeal without the Judge's certificate.

Statement.

THIS was an original motion for an extension of the time for appealing from an order made by Vice-Chancellor *Hall* at Chambers on the 30th of April, 1877.

The action was commenced on the 6th of November, 1876, by a next friend in the name of some infant legatees under the will of

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Statement.

Thomas Elsom, deceased, for the administration of his real and personal estate. The Defendants were the executors of the will. On the 23rd of November, 1876, upon the motion of the Defendants, Vice-Chancellor *Hall* ordered an inquiry to be made whether it would be fit and proper, and for the benefit of the Plaintiffs, that the action should be further prosecuted, and that in the meantime all further proceedings in the action should be stayed. On the 29th of March, 1877, the Chief Clerk made his certificate, finding that it would not be fit and proper, and for the benefit of the Plaintiffs, that the action should be further prosecuted. A summons to vary the certificate was taken out in the name of the Plaintiffs, and on the 30th of April this summons was heard by the Vice-Chancellor in Chambers, and was dismissed. On the 5th of July, upon the motion of the Defendants in Court, the Vice-Chancellor ordered the action to be dismissed, with costs to be paid by the next friend. On the 27th of July, by the special leave of the Court of Appeal, a notice of motion was given in the name of the Plaintiffs to extend the time for appealing from the order of the 30th of April, as well as from the order of the 5th of July.

There was evidence that the Vice-Chancellor had refused to adjourn into Court the hearing of the summons to vary the Chief Clerk's certificate, and that the next friend's solicitor had not succeeded in obtaining a certificate from the Vice-Chancellor that he did not desire to hear any further argument upon the summons, but it did not appear that any formal application had been made for the certificate.

Argument.

Bond Coxe, for the motion:—

The order of the 30th of April having been made in Chambers it could not be appealed from without the Vice-Chancellor's certificate that he did not desire to hear any further argument in Court: *In re Humber Ironworks Company* (1). The evidence shews that we have done all we can to obtain the Vice-Chancellor's certificate.

Dickinson, Q.C., and *Mulligan*, for the Defendants, were not heard.

(1) Law Rep. 5 Ch. 88.

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In re ELSOM. THOMAS *v.* ELSOM.

Judgment, Jessel, M.R.

JESSEL, M.R.:—

As regards the present application, I think that no sufficient explanation has been given of the delay which has taken place. The time for appealing from the order of the 30th of April had already elapsed before the motion was made before the Vice-Chancellor to dismiss the action. There is no satisfactory evidence of any proper application having been made to the Vice-Chancellor to certify that he did not desire to have the summons argued more fully in Court. The present motion must, therefore, be refused.

With regard to the general practice, I think there is nothing which binds the Court of Appeal not to hear an appeal from an order made by a Judge of the Chancery Division in Chambers upon any terms it may think fit. It is quite competent to the Court of Appeal to hear such an appeal without any certificate of the Judge that the case has been fully argued before him in Chambers. The Appellant would only have to satisfy the Court of the fact that the Judge did not desire to hear any further argument. At the same time it is for several reasons very inconvenient to hear appeals from orders made in Chambers. In the first place, matters are disposed of very hurriedly in Chambers. It was never intended that questions of principle should be decided there. A great number of cases must be disposed of in a limited time, and they are necessarily disposed of without much discussion. Moreover, as a general rule, the Judge delivers no judgment in Chambers, and, therefore, in hearing an appeal from an order made in Chambers, the Court of Appeal would be placed at a great disadvantage, because it would not be informed of the reasons which influenced the Judge in coming to a conclusion. As a general rule, therefore, when parties wish to appeal from an order made in Chambers, they should inform the Judge of their intention, so that he may either adjourn the case into Court for argument or deliver a judgment which will enable the Court of Appeal to understand the reasons which have influenced his mind.

James, L.J.

JAMES, L.J.:—

I am of the same opinion. I agree that no sufficient explana-

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tion has been furnished of the delay which has taken place in obtaining the Vice-Chancellor's certificate. I should be very loth indeed to entertain an appeal on such a question as this—a question whether an action is for the benefit of infants. Such a matter as that had much better rest with the decision of the Judge of first instance. If there may be an appeal from his decision to us, there may equally be an appeal from our decision to the House of Lords. But it is enough in the present case to say that no sufficient explanation has been given of the time which has elapsed since the attempt was made to induce the Vice-Chancellor to reverse the Chief Clerk's certificate. With regard to the general practice, I am reminded that the late Lord Justice *Mellish* and myself were frequently told on appeals from orders made in Chambers that no certificate could be obtained from the Judge, and if we were satisfied of that fact, we always heard the appeal without any certificate. I believe the late Vice-Chancellor *Stuart* always refused to give any certificate. The only object of the certificate is to shew the Court of Appeal that the order appealed from is not one of those matters which are passed almost as of course in Chambers. If the Judge shews in any way that he does not desire to have any further argument, that is enough. Such an order is as much an order of the Court of first instance as if it were made publicly in open Court, and the Court of Appeal is bound to hear an appeal from it. The sole object of requiring the Judge's certificate is to satisfy the Court of Appeal that he has really judicially determined the matter. If that be so there ought not to be any difficulty in obtaining such a certificate, but if there is, the parties have only to come and tell the Court of Appeal, and the appeal will then be heard as a matter of course.

Judgment, James, L.J.

BAGGALLAY, L.J.:—

Baggallay, L.J.

I agree as to the delay in the present case. With regard to the practice, I think that the Court of Appeal only requires to be satisfied that the Judge has so fully heard the case that he does not desire to hear any further argument. The Judge's own certificate is the most convenient mode of proving this fact, but it may be proved by other evidence.

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Judgment, Cotton, L.J.

COTTON, L.J.:—

I also think that the delay in the present case is a sufficient reason for refusing this motion. With regard to the general practice, I may say that if neither of the courses referred to by the Master of the Rolls have been adopted, and no certificate has been obtained from the Judge, the parties should apply to the Court of Appeal for leave to set down the appeal without any certificate. Such an application would be granted as a matter of course.

Solicitor for next friend: *J. A. Sparling.*
Solicitors for Defendants: *Patey & Warren.*

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C. J. B.
May 14.
C. A.
July 26; *Aug.* 2.

Ex parte FLETCHER. *In re* VAUGHAN.

Appeal—Rehearing—Order by County Court as auxiliary to London Court—Mutual Credit Clause—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 39, 71, 74.

The Chief Judge in Bankruptcy has power to review an order made by a County Court, under sect. 74 of the *Bankruptcy Act*, 1869, as auxiliary to the *London* Court.

Per Bacon, C.J.: The operation of sect. 39 of the *Bankruptcy Act*, 1869, cannot be excluded by agreement.

Statement.

ON the 31st of August, 1876, *Thomas Vaughan* and *George Neesham*, ironmasters at *Middlesborough*, filed a liquidation petition in the *London* Bankruptcy Court.

On the 12th of December, upon the application of the trustees, under sect. 74 of the *Bankruptcy Act*, 1869, that the aid of the County Court of *Durham*, at *Stockton-on-Tees*, be sought for the purpose of hearing and determining an application respecting the claim of the debtors against a firm of *Jackson, Gill, & Co.*, also ironmasters at *Middlesborough*, it was ordered by one of the Registrars of the *London* Court that such application by motion or otherwise be made and determined, and such witnesses as might be necessary in proving the said claim be examined, at such time and place as the said County Court might appoint, and that

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the said Court might make such order as might seem to it just; and further, that the said aid be sought from the said Court for the purpose of carrying out the order; and the *London* Court thereby requested the said Court to be auxiliary to that (the *London*) Court, and to hold such sittings, make such appointments, and issue such process, and render such aid generally, as might be necessary to give effect to the above-mentioned order, and that the evidence taken, and order or orders made therein by the aforesaid County Court, be forthwith transmitted to that (the *London*) Court.

Statement.

The Judge of the County Court, in compliance with the above order, heard evidence, and on the 31st of January, 1877, delivered a judgment, in which he decided a question of fact, and ruled a point of law, and in conclusion ordered *Jackson, Gill, & Co.*, the claimants, to pay within one month the sum of £1167 19*s.* 4*d.* to the trustees, together with the costs of the motion.

From this order *Jackson, Gill, & Co.* appealed to the Chief Judge. The appeal was heard on the 14th of May, 1877.

De Gex, Q.C., and *Finlay Knight*, for the Appellants.

Argument.

Winslow, Q.C., and *West*, for the trustees:—

We take the preliminary objection, that an appeal does not lie from this order to the Chief Judge. The order was made in a *London* bankruptcy; and the County Court has in effect exercised the jurisdiction of the *London* Court for the purpose of making the order. The order appealed from is consequently an order of the *London* Court, and it cannot hear an appeal from its own order. The only appeal is to the Court of Appeal.

De Gex, contrà:—

This is an order of the County Court Judge, not the mere report of a commission to examine witnesses. It is a *Stockton* order, not a *London* order.

The only orders from which a right of appeal is by sect. 71 given to the Court of Appeal, are orders of the Chief Judge; so that the Court of Appeal has no power to hear an appeal from this order; and if the objection be allowed, the suitor will be deprived of all right of appeal.

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Ex parte FLETCHER. *In re* VAUGHAN.
Argument.

Winslow, in reply:—

When Lord *Selborne*, L.C., sat for the Master of the Rolls, he refused to hear appeals from his own orders, made on behalf of the Master of the Rolls.

Where a Registrar had acted under sect. 130 of the *Bankruptcy Act*, 1869, which abolished the country district Courts of Bankruptcy, an appeal from his order was held to lie to the Court of Appeal in Chancery: *Ex parte Blair* (1).

Judgment, C. J. B.

BACON, C.J.:—

This is quite a new point.

No doubt some of the words of the Act of Parliament create a difficulty. If it be true that the Court of Appeal can only hear this appeal, it would in this case be out of time, and the Appellants would be debarred from all relief. I cannot so decide. I do not feel disposed to put such a narrow construction upon the Act of Parliament, but must confine myself to its provisions. Now the 71st section gives any party a right of appeal to the Chief Judge in Bankruptcy, and then his order is also subject to an appeal to the Lords Justices; that is quite clear. Then the 74th section, which is the one that throws a doubt upon the subject, provides that "the *London* Bankruptcy Court, the local Bankruptcy Court, the Courts having jurisdiction in bankruptcy in *Scotland* and *Ireland*, and every British Court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of such Courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy; and an order of the Court seeking aid, together with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by such order, the like jurisdiction which the Court which made the request, as well as the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions." It is said that the *London* Court having found it expedient to avail itself of this section, and to seek the aid of a County Court, the order of the County Court is the order of the *London* Court, and that there

(1) Law Rep. 5 Ch. 482.

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can be no appeal to the Chief Judge from that order. But the order is made by the County Court subject to appeal to the Chief Judge. That, I think, is the fair construction and meaning to be put upon the Act of Parliament. I am of opinion, therefore, that the Act not only empowers but requires me as a duty to hear this appeal, and I do so with the less hesitation because, if I am wrong, there can be no difficulty in appealing from my decision.

The appeal was then heard on its merits.

Statement.

The facts of the case were as follows:—

Vaughan & Co., the debtors, traded with *Jackson, Gill, & Co.* with the result that prior to the 13th of July, 1876, *Vaughan & Co.* owed *Jackson & Co.* £1762 9*s.* 3*d.*

On the 13th of July, 1876, a bill of *Vaughan & Co.* was returned to *Jackson & Co.* dishonoured, whereupon an arrangement was come to between the firms, the nature of which was in dispute.

According to *Neesham's* evidence, in order to prevent the stoppage of the works, he, on behalf of his firm, directly after the acceptances were dishonoured, arranged with *Jackson, Gill, & Co.*, and other firms and companies with whom *Vaughan & Co.* then had current contracts and dealings, that all debts due on the 13th of July, and all acceptances and liabilities then running should be held in suspense, and that from that date all goods supplied to *Vaughan & Co.*, and all iron and goods delivered by them should respectively be paid for in cash, or set off against each other, and that future deliveries of iron and goods by *Vaughan & Co.* should not be set off against debts due or liabilities current on the 13th of July. *Neesham* said that this was agreed to on behalf of *Jackson, Gill, & Co.* by *Gill* on the 15th and confirmed on the 17th of July.

The account of the transaction given by the secretary of *Jackson, Gill, & Co.* was, that all goods sent by *Jackson, Gill, & Co.* to *Vaughan & Co.* were to be set off against *Vaughan & Co.'s* pig-iron account against them, *Jackson, Gill, & Co.* supplying manufactured iron.

The mutual dealings went on till the 1st of August, and on the 12th of August *Jackson, Gill, & Co.* gave their acceptance to

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Vaughan & Co. for £637 2*s.* 6*d.* as the balance due for the goods supplied by *Vaughan & Co.* between the 17th of July and the 1st of August.

From and after the 1st of August the mutual dealings were again continued, with the result that on the 31st of August the balance due from *Jackson, Gill, & Co.* to *Vaughan & Co.* amounted to £1167 19*s.* 4*d.*

Statement.

Vaughan & Co.'s liquidation petition was filed on the 31st of August.

The question was whether, under the alleged arrangement, *Jackson, Gill, & Co.* were bound to pay the above sum of £1167 19*s.* 4*d.* to the trustees in the liquidation, or whether *Jackson, Gill, & Co.* were entitled to set it off against their old debt of £1762 9*s.* 3*d.*

On the 31st of January, 1877, upon the application of the trustees, the Judge made an order declaring that, upon taking the accounts, *Jackson, Gill, & Co.* were not entitled to set off the sum of £1167 19*s.* 4*d.* against any debt due on acceptances given to them by *Vaughan & Co.* prior to the 13th of July, 1876, and it being admitted that, on an account taken on the footing of this declaration, the sum of £1167 19*s.* 4*d.* was the amount due from *Jackson, Gill, & Co.* to the trustees of *Vaughan & Co.*, the Court did not direct any account to be taken, but ordered *Jackson, Gill, & Co.* to pay the said sum to the trustees, within one month, together with the costs of the application.

This was the order from which *Jackson, Gill, & Co.* appealed.

Argument.

De Gex, Q.C., and *Finlay Knight*, for the Appellants:—

There was no agreement on our part to alter the ordinary course of business. For a time, no doubt, we dealt with the debtors on special terms, but that arrangement ceased at the end of the month of July. We did not agree to forego our ordinary rights under the mutual credit clause.

As a matter of law, suppose they had agreed to sell to us for ready money only; that would not have interfered with our right to set off our debt to them against an old debt of theirs to us: *Eland* v. *Karr* (1). Even an agreement not to set off particular

(1) 1 East, 375.

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payments against an old debt is not binding in bankruptcy: *McGillivray* v. *Simson* (1); *Lechmere* v. *Hawkins* (2).

From *Ex parte Barnett* (3) it appears that the effect of sect. 39 is to give to either side a right to have the accounts taken just as they stand.

Argument.

Winslow, Q.C., and *West*, for the trustees:—

The distinction is pointed out by Mr. Justice *Littledale* in *Clarke* v. *Fell* (4), cited in *Ex parte Barnett* (5). "If there had not been a contract to pay ready money, I should have been of a different opinion;" and Lord *Selborne* adds, "Now here, of course, there was no special contract, like the contract there, to pay ready money." That is to say, the learned Judges would have decided otherwise had there been a special contract.

Assume that as between *A.* and *B.* there is no right to set off, what would be the effect of a number of creditors meeting and resolving that their debts should be set off in this way? Can a creditor be permitted to say, I will have the benefit of all the goods you have supplied to me under a special contract on my part to pay cash for them, and then set off those supplies against an old debt? The old debt would be paid off in full, and there would be a fraudulent preference.

Upon the evidence we say that the agreement was not limited to the month of July—it was an agreement unlimited in date, and it was entered into not only by the Appellants, but by all the other creditors.

Under the special circumstances sect. 39 of the *Bankruptcy Act*, 1869, has no application.

BACON, C.J.:—

Judgment, C. J. B.

I find no substantial difference in the statement of facts on either side. The debtors allege an agreement by the creditors to keep them upon their legs, if possible; and, in order to enable them to do so, to suspend their rights, and that all goods supplied on either side should be paid for in cash; that is all. Then the

(1) 2 Car. & P. 320.
(2) 2 Esp. 626.
(3) Law Rep. 9 Ch. 293.
(4) 4 B. & Ad. 404, 407.
(5) Law Rep. 9 Ch. 296.

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C. A. 1877 *Ex parte* FLETCHER. *In re* VAUGHAN. Judgment, C. J. B.

Appellants say that there was an agreement to pay for all goods delivered to or by the debtors during a certain time in cash; but that agreement cannot put an end to the pre-existing rights of the creditors if the time should come when those suspended rights must be enforced. If there were such a contract as alleged by the debtors, there was no consideration for it, and the damages for the breach of it would be nil. But the Act of Parliament is plain, and it provides that when a man becomes bankrupt the accounts are to be taken in the manner stated by Lord *Selborne* in *Ex parte Barnett* (1), where he says: "When there have been mutual credits, debts, or mutual dealings, and a proof is to be made in bankruptcy, there is to be a rule of set-off, not, as I understand it, at the option of either party, but an absolute statutory rule, 'the balance of such account, and no more, shall be claimed or paid on either side respectively.'" The law of mutual credit, therefore, is an especial statutory law, and if there were such an agreement as alleged by the debtors, that law put an end to it. I am of opinion, therefore, that the order of the County Court has proceeded upon a mistake of law, and it must be discharged with costs.

C. A. From this decision the trustees appealed. The appeal was heard on the 26th of July and the 2nd of August.

Argument. *Winslow*, Q.C., and *E. C. Willis*, for the Appellants:—

The order of the County Court Judge was made by him as the deputy of the Chief Judge. It was really the Chief Judge's own order, and no appeal lay to him from his own order. The appeal should have been brought directly to this Court.

[JAMES, L.J.:—Does not sect. 71 authorize the Chief Judge to review an order made by his deputy?

BAGGALLAY, L.J.:—If the order is that of the *London* Court, may it not be rescinded or varied by that Court?]

If so, the Chief Judge could always review orders made for him by the Registrars of the *London* Court acting as Chief Judge.

[JAMES, L.J.:—We must hear the case on the merits.]

(1) Law Rep. 9 Ch. 295.

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It is quite competent to exclude, by means of a special agreement, the right of set-off given by sect. 39, and the evidence proves the existence of the agreement which we allege.

De Gex, Q.C., and *Finlay Knight*, for *Jackson, Gill, & Co.*, were not heard.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am of opinion that the order of the Chief Judge must be affirmed. The Respondents are entitled to the set-off which they claim unless there is some agreement binding at law or in equity which excludes their right. The burden of proving the existence of such an agreement is on the Appellants, and in my opinion they have not discharged it.

Baggallay, L.J.

BAGGALLAY, L.J.:—

The right to the set-off is clear unless the Respondents have precluded themselves from enforcing it by some special agreement. It appears to me that no such agreement is proved.

Cotton, L.J.

COTTON, L.J.:—

I am entirely of the same opinion. Of course the burden is on the Appellants to make out that there is an agreement depriving the Respondents of the right of set-off under sect. 39. If there was any binding agreement at all in this case I think it only went to this extent, that for the purpose of avoiding a bankruptcy these particular acceptances should not be set off, but that it did not deprive the Respondents of the right of set-off in the event of a bankruptcy.

Solicitors for Trustees: *Jacobs & Vincent*, agents for *North & Son, Leeds.*

Solicitors for *Jackson & Co.: Van Sandau & Cumming*, agents for *Belk & Parrington, Middlesborough.*

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C. A.
1877
Aug. 2.

Ex parte BROCKLEBANK. *In re* BROCKLEBANK.

Debtor's Summons—Debt due to Infant—Next Friend—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 7.

An infant creditor may issue a debtor's summons in his own name.

Semble, that in such case the debtor would be entitled, if he asked for it, to have some adult person named as security for the costs of the summons.

But if he makes no such application, but allows the summons to proceed in the ordinary way, an adjudication of bankruptcy, founded upon non-compliance with it, is valid.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, sitting as Chief Judge in Bankruptcy.

On the 28th of October, 1876, *Henry Bradshaw* commenced an action in the Exchequer Division against *Thomas Brocklebank* for breach of a contract of apprenticeship. The Plaintiff was an infant, but the writ was issued in his own name without the intervention of any next friend. On the 16th of November, on the petition of the Plaintiff, an order was made that he should be at liberty to prosecute the action by *Eleanor Bradshaw* as his guardian and next friend. On the 17th of May, 1877, judgment was signed for the Plaintiff for £155 12*s.* 6*d.* damages and the taxed costs of the action. The costs were taxed at £99 18*s.* 10*d.*, making with the damages a total of £255 11*s.* 4*d.* On the 22nd of May a debtor's summons was issued in the name of the infant alone against *Brocklebank* for the £255 11*s.* 4*d.* *Brocklebank* applied to have the summons dismissed, on the ground that he was not indebted in the amount claimed. Upon this application an order was made staying the proceedings on the summons on the terms of the debtor giving security for the debt. The security was not given within the time fixed, and the debt was not paid, and on the 1st of June the infant, by *J. N. Bradshaw*, his next friend, presented a bankruptcy petition against *Brocklebank*, alleging the non-compliance with the debtor's summons as an act of bankruptcy. *Brocklebank* disputed the petitioning creditor's debt and the act of bankruptcy. On the 16th of July the Registrar made an adjudication of bankruptcy. *Brocklebank* appealed.

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E. C. Willis, for the Appellant:—

No act of bankruptcy has been committed. The infant was not competent to instruct a solicitor to issue the summons, and he was incapable of giving a valid discharge for the debt if it had been tendered to him. The summons was, therefore, issued by a person who had no authority to issue it. It is clear that the infant could not present a bankruptcy petition except through a next friend, and this is the course he has actually adopted.

[JAMES, L.J.:—Why should not an infant issue a debtor's summons in person? It does not appear that the intervention of a solicitor is necessary. Cannot an infant give a receipt for wages or a salary due to him in respect of his personal labour?]

In *Ex parte Sergison* (1) it was held that an infant executor could not be permitted to receive money due to the testator on a mortgage. In *Stott* v. *Meanock* (2) it was held that an infant executor who had during his infancy received part of the testator's assets, and had paid them to the tenant for life by whom they were lost, was not liable to account for them. *Collins* v. *Brook* (3) shews that though payment to the next friend might be good, yet the money is still the money of the infant, and he could afterwards sue the person who had received the money by the authority of the next friend. In *Ledward* v. *Hassells* (4) it was held that a good discharge to executors for a legacy to an infant could only be given by means of a Chancery suit. The 36 Geo. 3, c. 52, s. 32, shews that infancy is a bar to the right to receive money.

[COTTON, L.J.:—Would not payment to the next friend in the action have been an answer to the summons?]

At any rate there was no one who would have paid *Brocklebank* the costs of the debtor's summons if it had been dismissed with costs.

Blackmore and *Dunne*, for *Bradshaw*, were not heard.

(1) 4 Ves. 147.
(2) 31 L. J. (Ch.) 746.
(3) 4 H. & N. 270.
(4) 2 K. & J. 370.

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Ex parte BROCKLE-BANK.

In re BROCKLE-BANK.

Judgment, James, L.J.

JAMES, L.J.:—

In the absence, so far as I am aware, of any authority to the contrary, I am of opinion that an infant to whom a debt is due has the same rights as any other person, that he is entitled to enforce the payment of it by means of a debtor's summons and proceedings in bankruptcy based thereon. Here the infant sued out the writ in the action in his own name. He afterwards obtained leave to carry on the action by a next friend, and he recovered judgment. The money found due by the judgment was, as it was laid down in *Collins* v. *Brook* (1), the money, not of the next friend, but of the infant, though the next friend might be his agent to receive it. By the law of *England* it is the duty of a debtor to find out his creditor and pay him; it is not the duty of the creditor to find out the debtor. If the debtor in the present case had been really minded to pay he would have had no difficulty in finding a person who could have given him a good discharge for the debt. A man cannot be allowed to escape from the payment of a debt because the person to whom it is due happens to be an infant. He cannot be permitted to say, "I will cheat my creditor because he is an infant." It is said that the debtor's summons ought to have been issued by a next friend on behalf of the infant. I am not aware of any such practice in the Court of Bankruptcy. In the Court of Chancery a suit on behalf of an infant was brought in his name by a next friend in order to give security for the costs to the Defendant, but if the suit had been commenced without the intervention of a next friend, and the Defendant chose to appear, I know of no reason why it should not have been prosecuted without a next friend. Probably, if in the present case an application had been made by the debtor in the first instance, that some adult person should be named for the purpose of giving security for the costs of the debtor's summons, the application would have been successful. If, however, there was any irregularity in this respect, it has been waived by the debtor. The summons was heard and disposed of in the usual way, and an act of bankruptcy has been committed by the failure to comply with it. There is, therefore, no ground for objecting to the adjudication.

(1) 4 H. & N. 270.

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BAGGALLAY, L.J.:— C. A. 1877 *Ex parte* BROCKLEBANK. *In re* BROCKLEBANK.

If there was any irregularity in the proceedings in the first instance, of which I am by no means sure, I think it has been waived by the debtor's own conduct.

COTTON, L.J.:—

If there has been any irregularity in point of form, I agree that it is too late to raise the objection now. The question of substance is, whether the adjudication ought to have been made. I am clearly of opinion that if the debtor had met the summons by saying, "I am willing to pay the debt to the person who can properly receive it, to the Plaintiff's solicitor in the action, or to the next friend," and had asked the Registrar for directions, that would have been a sufficient compliance with the summons. A judgment having been recovered for the debt, there was a regular mode of discharging the liability created by it, and, as the debtor did not choose to avail himself of it, the adjudication was rightly made.

Judgment, Baggallay, L.J. Cotton, L.J.

Solicitors for Debtor: *Elmslie, Forsyth, & Sedgwick.*
Solicitor for Creditor: *G. Johnson.*

In re SPARKS (A PERSON OF UNSOUND MIND.)

C. A. 1877 *Aug.* 4.

Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *ss.* 3, 48, 51—*Vesting Order—Costs—Mortgagee of Unsound Mind, not so found—Application by Mortgagor.*

Where a mortgagee becomes of unsound mind, not so found, and the mortgagor applies for a vesting order on payment into Court of the mortgage debt, making the mortgagee a Respondent to the petition, the Court has no jurisdiction to make an order for the costs to be paid out of the mortgage debt, but each party must bear his own costs.

Statement.

BY an indenture of mortgage dated the 20th of July, 1871, a leasehold house in *Middlesex* was demised by *S. Davidson* to *T. C. Hayward* and *R. E. Davidson* for a term of years, by way of mortgage for securing the repayment of £2500 and interest.

In April, 1873, the mortgaged premises and the debt secured thereon were assigned to *T. H. Sparks;* and on the 11th of

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C. A. 1877

In re SPARKS (A PERSON OF UNSOUND MIND).

Statement.

November, 1876, the equity of redemption in the same premises was assigned to the Petitioner, *J. H. Wilson.*

On the same day *Wilson* gave notice to *Sparks* of his intention to pay off the debt at the end of six months, which was accepted by *Sparks'* solicitors on his behalf.

Sparks was not, however, in a state of health to attend to the business, and since that time he had become of unsound mind, but had not been so found by inquisition.

Wilson accordingly now presented a petition in Lunacy under the *Trustee Act*, 1850, praying that he might be at liberty to pay the amount of the mortgage debt, after deducting the costs of the application therefrom, into the *Bank of England*, in trust in this matter; and that upon such payment the mortgaged premises might vest in him discharged from the mortgage debt.

Argument.

Levett, for the Petitioner:—

The mortgagor is entitled to deduct the costs of the petition from his mortgage debt. The case is governed by *Re Biddle* (1), where the costs of a mortgagor under similar circumstances were allowed. If the mortgagee had been found lunatic, and the petition had been presented by his committee, the costs would have come out of the lunatic's estate: *In re Rowley* (2); *In re Marrow* (3); *In re Stuart* (4); *Ex parte Richards* (5); *In re Townsend* (6); *In re Thomas* (7); *In re Jones* (8). In the present case the mortgagee has not been found lunatic, and by the mortgagor presenting this petition expense has been really saved to the mortgagee's estate, as it has rendered it unnecessary to make him a lunatic and appoint a committee. It would be unreasonable that the mortgagor should pay the costs caused by the unsoundness of mind of the mortgagee. *In re Viall* (9) is also in our favour.

Rigby, for the mortgagee:—

The cases in which the committee of a lunatic mortgagee pre-

(1) 23 L. J. (Ch.) 23.
(2) 1 D. J. & S. 417.
(3) Cr. & Ph. 142.
(4) 4 De G. & J. 317.
(5) 1 Jac. & W. 264.
(6) 2 Ph. 348.
(7) 22 L. J. (Ch.) 858.
(8) 2 Ch. D. 70.
(9) 8 D. M. & G. 439.

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sented the petition do not apply. In those cases the committee was getting in the lunatic's estate, and therefore the costs were ordered to fall on the estate. In the case of *Re Biddle* (1) the receiver of the mortgagee's estate was a co-Petitioner with the mortgagor. In *Re Wheeler* (2) it was decided that a mortgagor who brings a petition for a vesting order must pay the costs of it, unless the lunatic's committee has refused to convey. The petition being presented under the *Trustee Act*, the Court has no jurisdiction to make any order for costs, except against the Petitioner or against his estate.

Argument.

Levett, in reply.

JAMES, L.J.:—

Judgment, James, L.J.

I think, now that the matter has been considered, there is something that has been overlooked in the former cases. This is an application exclusively under the Trustee Acts, and the Court has no jurisdiction in the matter except under those Acts. The 51st section of the Act of 1850 says what jurisdiction the Court is to have as to costs, and it enacts that the Court may order the costs and expenses of orders "to be raised and paid out of or from the lands or personal estate, or the rents or produce thereof, in respect of which the same respectively shall be made." Here the estate in respect of which the application is made is the mortgagor's estate, which he wants to get vested in him discharged from the mortgage debt. We have jurisdiction to order the mortgagor to pay costs out of that estate if we think right. When a Petitioner under the Act comes to this Court he submits himself to our jurisdiction as to costs, but I am not aware of any jurisdiction to make any one else pay costs. The Respondent is brought here not by his own wish, and I do not know what authority we have to make a person pay the costs when he is brought here for the benefit of the Petitioner.

Then it is said that this may be done in another mode, which would have necessitated the appointment of a committee, and so costs could have been caused to the lunatic's estate, and a redemption suit might have been instituted, which would have given the

(1) 23 L. J. (Ch.) 23. (2) 1 D. M. & G. 434.

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C. A. 1877 *In re* SPARKS (A PERSON OF UNSOUND MIND).

Judgment, James, L.J.

Court jurisdiction to make the lunatic's estate pay the costs. However that may be, the Act provides the simplest course of proceeding, and that is, that the mortgagor should bring the money into Court to the account of the person of unsound mind, and when that is done he is entitled to a vesting order, which he must obtain at his own cost.

The Petitioner says that the difficulty has arisen from the misfortune of the mortgagee, and that he ought not to suffer for that. I do not see why the mortgagor should be relieved from payment of costs by the misfortune of the mortgagee, although it would not be right to make him pay the mortgagee's costs. There will, therefore, be no order as to costs on either side.

Baggallay, L.J. BAGGALLAY, L.J.:—

I am of the same opinion. The order will be that the Petitioner have liberty to pay the money into Court to the account of the Respondent, with interest to the day of payment. No order as to costs. If the money is invested in Court, the Respondent must, of course, pay the costs of the investment.

COTTON, L.J., concurred.

Solicitors: *Robinson, Son, & Edmonds; Druce, Sons, & Jackson.*

C. A. 1877 *July* 14, 21.

WIDGERY *v.* TEPPER.

[1874 W. 90.]

HALL *v.* TEPPER.

[1871 H. 113.]

Practice—Charging Order—1 & 2 *Vict. c.* 110, *ss.* 14, 18; 3 & 4 *Vict. c.* 82, *s.* 1—*Rules of Court*, 1875, *Order* XLVI., *r.* 1—*Stop Order.*

A decree was made in the suit of *W.* v. *T.*, declaring the Plaintiffs entitled to one-fifth share of the proceeds of the sale of certain personal property which had been received by the Defendants, and directing an account of what was due to the Plaintiffs, and ordering the Defendants to pay to them what should be found due, together with the costs of the suit. Part of the proceeds of the sale had been previously paid into Court in

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another suit of *H.* v. *T.* against the same Defendants, and by a decree in that suit had been ordered to be paid to the Defendants. As soon as the decree in *W.* v. *T.* had been pronounced, and before it was drawn up, the Plaintiffs obtained an order *ex parte* for a charging order *nisi* against the Defendants charging the fund in Court in *H.* v. *T.*, and for a stop order in the meantime:—

Held, by the Court of Appeal, on the Defendants shewing cause against the order, first, that the specific sum due to the Plaintiffs not being ascertained, nor the costs taxed, the charging order was irregular, and must be discharged:

Secondly, that the Court could not grant a stop order until the Plaintiffs, by some independent proceedings, had established their right to attach the fund in Court in the suit of *H.* v. *T.*

Burns v. *Irving* (1) not followed.

Statement.

IN this case a petition was presented by *J. T. Widgery* and *S. Widgery*, the Plaintiffs in the suit of *Widgery* v. *Tepper*, under the following circumstances:—

J. M. W. Turner, R.A., died in 1851, having by his will given a portion of his property to the persons therein named, but dying intestate as to certain engravings, pictures, drawings, and sketches.

A suit having been instituted for the administration of his estate, it was stated that the engravings, &c., belonged to the five next of kin of *J. M. W. Turner*, namely, *Coham Turner*, *Thomas Price Turner*, Mrs. *Matthews*, Mrs. *Tepper*, and Mrs. *Widgery*, the wife of *J. Widgery*, in equal shares.

In 1858, *Jabez Tepper*, the son of Mrs. *Tepper*, agreed with *T. P. Turner*, Mrs. *Matthews*, and Mrs. *Widgery*, to purchase the share of each of them in the engravings, &c., for £500.

J. Widgery died in 1861, and his wife in 1871, and *Jabez Tepper* died in 1872. Mrs. *Matthews* was also dead. The suits of *Turner* v. *Tepper*, *Widgery* v. *Tepper*, and *Hall* v. *Tepper*, were instituted respectively by *T. P. Turner*, the personal representatives of *J. Widgery*, and the personal representatives of Mrs. *Matthews*, for the purpose of setting aside the sale of the engravings to *Jabez Tepper*. The Defendants in *Widgery* v. *Tepper* were *Samuel Tepper*, who was the personal representative of *Jabez Tepper*, and *W. C. Turner* and *J. T. Turner*, who were the executors of *J. M. W. Turner*, the original testator, and the same persons were Defendants in the suit of *Hall* v. *Tepper*.

(1) 3 Ch. D. 291.

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WIDGERY v. TEPPER.

HALL v. TEPPER.

Statement.

The engravings were sold at various times, the sums amounting altogether to more than £37,000. Of this sum a portion had been paid into Court in *Widgery* v. *Tepper*, and was represented by £3276 15*s.* 11*d.* consols, and £46 in cash, and another portion had been paid into Court in *Hall* v. *Tepper*, and was represented by £7230 17*s.* 7*d.* consols, and £130 3*s.* 7*d.* cash.

By the decree made on the hearing of *Widgery* v. *Tepper* on the 31st of May, 1877, it was declared that the Petitioners, who were the Plaintiffs, as the executors of *J. Widgery*, were entitled to sue in respect of his share in right of his wife, *M. A. T. Widgery*, in the engravings, &c., sold to *Jabez Tepper*; and it was declared that the sale was not binding upon the Petitioners nor upon the estate of *J. Widgery*, and that the same ought to be set aside; and an account was directed of the net proceeds of the sales of the said engravings, &c., received by the Defendants or any other persons to their use; and it was ordered that the Chief Clerk should certify what was the amount of one-fifth part of the net proceeds of the sale, and what balance was due to the Petitioners in respect of the one-fifth share, after deducting the value of £3276 15*s.* 11*d.* consols, and £46 0*s.* 5*d.* cash in Court to the credit of the cause, and after deducting the purchase-money paid by *Jabez Tepper* for the said share of *J. Widgery*; and it was ordered that the sum of £3276 15*s.* 11*d.* consols and the sum of cash should be transferred and paid to the Petitioners; and it was declared that the Defendants *Samuel Tepper* and *J. T. Turner* and *W. C. Turner* were jointly and severally liable to pay to the Petitioners the balance which should be found due to the Plaintiffs, and that they should pay the same within fourteen days after the date of the said certificate, and that the costs of the Petitioners of the suit should be taxed and paid by the Defendants *S. Tepper*, *J. T. Turner*, and *W. C. Turner*, to the Petitioners, with liberty to apply (1).

The suit of *Hall* v. *Tepper* was compromised, and a decree made on the 15th of December, 1876, by consent, that after paying certain charges, one moiety of the residue of the funds in Court should be transferred and paid to *Samuel Tepper*, and the

(1) See the report of *Widgery* v. *Tepper*, 5 Ch. D. 516.

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other moiety to *J. T. Turner* and *W. Coham Turner*. The Petitioners alleged that the funds in Court in *Widgery* v. *Tepper* would be insufficient by £3500 or thereabouts to answer the one-fifth share of the Petitioners in the net proceeds of the sale of the engravings, &c., and they prayed that the sum of £7230 17*s.* 7*d.* consols and cash standing in Court to the credit of the cause of *Hall* v. *Tepper* might be charged with payment to the Petitioners of the balance to be found due to them under the accounts directed by the decree in *Widgery* v. *Tepper*, and with the payment of the costs of the same suit, unless the Defendants *S. Tepper*, *J. T. Turner*, and *W. C. Turner*, should shew cause to the contrary within seven days of the service of the order; and that in the meantime no part of the sum of £7230 17*s.* 7*d.* consols and cash might be transferred or paid out; and for further relief.

Statement.

This petition was presented on the 7th of July, 1877, before the decree in *Widgery* v. *Tepper* had been drawn up, and was not served on any person. On the 13th of July Vice-Chancellor *Malins* made the order prayed for.

The Defendants applied to the Vice-Chancellor to stay the drawing up of the order on the petition, which his Lordship refused to do, and the Defendants renewed the application before the Court of Appeal.

The matter came on to be heard on the 14th of July. After the appeal had been opened, the Lords Justices directed that the application should stand over till the 21st of July, and that it should then be treated as if cause was being shewn against the rule *nisi*: the Defendants to undertake not to deal with the funds in *Hall* v. *Tepper* in the meantime.

July 21. *Glasse*, Q.C., and *C. H. Turner*, for the personal representative of *Jabez Tepper*:—

Argument.

The order on this petition professes to be a charging order under the 1 & 2 Vict. c. 110, ss. 14, 18, and as such is irregular. In the first place, there is no judgment on which it can be based. At the time when the petition was presented the decree had not been drawn up, and even now it has not been passed and entered. The 18th section of the Act puts decrees and orders of a Court of Equity on the same footing as judgments of a Court of Common

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Argument.

Law; but no charging order can be obtained on a judgment at common law unless it is entered up.

In the second place, the 18th section only applies to a decree or order "whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person." In the present case there has only been an order to take an account and to pay the balance to the Plaintiffs, with the costs of the suit; and no sum has been yet ascertained, nor have the costs been taxed. It has been expressly decided that no charging order can be granted in such a case: *Chadwick* v. *Holt* (1). This same principle applies to costs which have not been taxed: *Jones* v. *Williams* (2). In the recent case of *Burns* v. *Irving* (3), where the contrary was held, these cases were not cited.

The Plaintiffs have no equity to support this order as a stop order under the general jurisdiction of the Court. It was intended to operate on a charging order, and as such must stand or fall. Nor can the Court on the present petition interfere with the funds in another suit: the Plaintiffs must institute an independent proceeding, or apply for an injunction on such merits as they can shew.

Bristowe, Q.C., and *T. A. Roberts*, for the representatives of Mrs. *Widgery*, referred to *Earl of Mansfield* v. *Ogle* (4).

J. Pearson, Q.C., and *W. W. Karslake*, for the Plaintiffs:—

The decree of the Vice-Chancellor dates from the day on which judgment was delivered, and it has never been the practice of the Courts of Chancery to suspend the proceedings in the suit till the decree is actually entered. The Plaintiffs are entitled to a fifth share of the whole proceeds of the sale of the engravings, and the funds in Court in *Hall* v. *Tepper* form part of these proceeds. A charging order was granted in a very similar case in *Wells* v. *Gibbs* (5). The amount to which the Plaintiffs are entitled is sufficiently ascertained to support the order: and with respect to the costs, in a very recent case such an order was made before the costs were taxed: *Burns* v. *Irving*.

(1) 8 D. M. & G. 584.
(2) 8 M. & W. 349.
(3) 3 Ch. D. 291.
(4) 4 De G. & J. 38.
(5) 22 Beav. 204.

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But even if the order cannot be supported as a charging order, it is a case in which the Court will grant a stop order on the fund which was included in the prayer of the petition. It is not denied that the Plaintiffs have an interest in the fund, and they claim the interference of the Court in its ordinary jurisdiction to restrain its being dealt with before their rights are secured: *Courtoy* v. *Vincent* (1); *Yescombe* v. *Landor* (2).

Judgment, James, L.J.

JAMES, L.J.:—

I think that this order cannot be sustained. It is quite clear that what was asked for in the petition was a charging order, and the stop order was merely asked for as a consequence of the charging order. It is evident that this was intended from the form of the petition. It asked for an order *nisi*, and was served on no one: the whole proceeding was on the notion of its being for a charging order. The authorities are sufficient to shew that a charging order cannot be given except for an ascertained sum, and not for costs, charges, and expenses, until they have been taxed. The necessity of an ascertained sum has been settled by numerous authorities; the necessity of the costs being taxed is clear from the case of *Jones* v. *Williams* (3). There cannot be a different rule in the Chancery Division from that which was established in the Court of Exchequer. It appears to me, therefore, that the charging order, *quâ* charging order, cannot be sustained on that ground. But, in truth, when the facts are considered, this is not a case to which a charging order is applicable, because a charging order is in the nature of an execution against the property of the person ordered to pay the money. But here the Petitioners say that it is their money, and they ask that it may be kept *in medio* till their claims are satisfied. That is not a subject for a charging order, and the Court cannot go into the question what ought to be done for the security of the Plaintiffs, and in what way the equity ought to be ascertained which is now asserted by the Plaintiffs in *Widgery* v. *Tepper* against the property of the Defendants in *Hall* v. *Tepper*. We are not here to discuss what steps they ought to take for this purpose. As to this we say nothing; but my opinion is that the charging order was improperly asked for,

(1) 15 Beav. 486. (2) 28 Beav. 80. (3) 8 M. & W. 349.

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C. A. 1877 WIDGERY v. TEPPER. — HALL v. TEPPER. — Judgment, Cotton, L.J.

and improvidently conceded, and that the order *nisi* must be discharged, without prejudice to any other application which the Plaintiffs may be advised to make.

BAGGALLAY, L.J.:—

I am of the same opinion.

COTTON, L.J.:—

I am of opinion that no order can be made on this petition. The petition asked for a charging order which cannot be sustained. My only doubt was whether in this Court it might not be right to say that, as the Plaintiffs were entitled to a share in a fund of which the money in Court in *Hall* v. *Tepper* forms part, the Defendants ought to be restrained from dealing with that fund. But I think, on consideration, that that cannot be done in this form of proceeding. It may be that the Plaintiffs may be entitled to an injunction in some other proceeding; but it is important not to interfere, except in accordance with the regular practice of the Court. The only case which has been cited to us as justifying such an interference is *Courtoy* v. *Vincent* (1). But there the party applying was in a position to enforce his right against any property of the debtor which could be seized, but he could not take the cheque in question because it was in the hands of the Accountant-General, and the Court gave him something like an equitable execution by staying the Accountant-General from parting with the cheque. But here the Plaintiffs have not entitled themselves to any specific part of the fund in Court. They only say, We have been declared entitled to an aliquot share of a large sum of money, and we cannot get it without taking part of another share which has been paid into Court in another suit. It is clear that such a claim must be established by an independent proceeding. The question has to be determined, whether the money in Court in *Hall* v. *Tepper* is really a portion of the fund of which the Plaintiffs are entitled to a share, and, if so, whether they are right in saying that they cannot get their share of the fund without taking some of that portion.

Solicitors: *Whitakers & Woolbert; J. Turner & Son; Guscotte, Wadham, & Daw.*

(1) 15 Beav. 486.

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BAGNALL *v.* CARLTON.

[1875 B. 224.]

C. A.
1877
V.-C. B.
March 7, 13, 14, 15, 19, 20, 21, 27; *April* 11, 12, 17, 18, 25.
C. A.
July 24, 27 28, 31; *Aug.* 3, 6, 7, 8.

Company—Profit made by Promoter—Fiduciary Relation—Contract not mentioned in Prospectus—Commission—Offer by Plaintiffs to allow Commission and Expenses—Solicitor of Company—Costs.

The Plaintiffs were a joint stock company which was formed for the purpose of purchasing and working a colliery and ironworks formerly the property of *J. Bagnall*, deceased. Before the company was formed *J. Bagnall's* trustees entered into negotiations with *R.*, a financial agent, to get up a company for the purchase of the property for about £300,000. *R.* applied to *C.*, and *C.* made an arrangement with *G.* upon the terms stated below. Two contemporaneous agreements were signed, by one of which the trustees agreed to sell the property to a trustee for the company for £300,000; and by the other, which was called in the pleadings the secret agreement, the trustees agreed with *C.* that he should bring out the company or forfeit £20,000; and that they should pay £85,000 for commission and risk. On the same day *C.* agreed with *G.* that *G.* should take the whole risk of bringing out the company, and should receive £60,000 and *C.* £25,000 of this bonus. *D. & Co.*, the vendors' solicitors, were to receive £1500 from the tenant for life of the property if the purchase was completed.

The company was established, the first directors being found by *R.*; and *D. & Co.* became the solicitors of the new company. The prospectus and articles referred to the agreement for the purchase of the property, but made no mention of the agreement between the vendors and *C.*, or of any of the arrangements relating to it. The purchase-money was paid to the vendors, who paid out of it £85,000 to *C.*, of which he gave £60,000 to *G.* and £10,000 to *R.* The directors were not informed by *D. & Co.*, or any other person, of the agreement between the vendors and *C.*; but some time afterwards they discovered it, and thereupon called a general meeting of the company to consider the subject. The result was that a bill was filed by the company against the vendors and against *R.*, *C.*, *G.*, and *D. & Co.*, praying that the purchase might be rescinded, or that the Defendants might be held liable to repay all the profits which they had made by the transaction; the Plaintiffs offering to allow expenses properly incurred and a fair commission.

Before the cause came to a hearing the Plaintiffs compromised the suit with the vendors, receiving from them £31,000 as the price of not insisting on the purchase being rescinded:—

Held (affirming the decision of *Bacon*, V.C.), that the suppression in the prospectus of the agreement between the vendors and *C.* was unjustifiable; and that the Defendants *R.*, *C.*, and *G.* were in a fiduciary relation to the intended company, and therefore could not be allowed to retain any profit which they had made without disclosing it to the company:

Held, also, that the compromise with the vendors did not affect the claim

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of the Plaintiffs against the Defendants, *R.*, *C.*, and *G.*, and that the last-named Defendants had no claim to any allowance in respect of the £31,000 paid by the vendors on such compromise:

But *held* (varying the decision of the Vice-Chancellor), that the Defendants *R.*, *C.*, and *G.* were entitled to be allowed their expenses properly incurred in bringing out the company; and that although they would not have been entitled to any commission unless the Plaintiffs had offered to allow it in their bill, the Plaintiffs could not retract their offer, and a fair commission must be allowed:

Held, also, that although *D. & Co.* had acted improperly in concealing from the company the agreement between the vendors and *C.*, they ought to have been dismissed from the suit when the Plaintiffs elected not to rescind the purchase; and inasmuch as *D. & Co.* had acted in the matter with no fraudulent intent, the Court dismissed the suit against them without costs up to the time of the compromise, and with costs as to all subsequent proceedings.

Statement.

THE bill in this suit was filed by *John Bagnall & Sons, Limited*, a company registered under the *Companies Act*, 1862, against *James Carlton*, *Albert Grant*, *W. H. Duignan*, *L. W. Lewis*, *John Richardson* (since deceased), *C. F. Richardson*, *R. Bagnall*, *R. S. Bagnall*, *J. Nayler*, *E. Nayler*, and *G. Bytheway*, for the purpose of setting aside a purchase of certain collieries and ironworks at *Gold's Hill*, *West Bromwich*, *Staffordshire*, or of compelling the Defendants who had received commission or profits to refund.

The property and business formerly belonged to Mr. *James Bagnall*, and was under the management of *Joseph Nayler* and *W. S. Nayler*. Mr. *Bagnall*, in 1871, being desirous of selling the property, caused a valuation of it to be made by Messrs. *Bird*, who estimated the entire property and business to be worth £300,000. He also commissioned Messrs. *Bird* to look out for a purchaser of the property, and promised them a commission of £60,000 if they succeeded. Mr. *James Bagnall* died in 1872, having by his will appointed his nephew *R. S. Bagnall*, *Joseph Nayler*, and *W. S. Nayler* his trustees, with directions for the sale of his property.

Messrs. *Duignan & Lewis* were the solicitors of Mr. *J. Bagnall*, and on his death they acted as the solicitors of his trustees. Messrs. *Bird* not having succeeded in finding a purchaser, Mr. *Richard Bagnall*, who was tenant for life of the property under Mr. *J. Bagnall's* will, promised Mr. *Duignan* £1500 as commission

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if he should find a purchaser for the property, and *Duignan* treated this as money coming to his firm. They accordingly put themselves into communication with Mr. *John Richardson*, who carried on the business of a financial agent and accountant in *Manchester*, in partnership with his son, the Defendant *C. F. Richardson*. *J. Richardson* introduced Messrs. *Duignan* to the Defendant *James Carlton*, a financial agent, also residing at *Manchester*; and an arrangement was made between Messrs. *Duignan*, on behalf of the trustees of Mr. *Bagnall's* will, that the Defendant *Carlton* should bring out a joint stock company with a capital of £300,000, to purchase the collieries and business for £290,370, payable as to £150,370 in cash and bills, and as to £140,000 in debentures. If Mr. *Carlton* performed his part of the agreement, he was to be paid £85,000 by the vendors: if he failed he was to pay £20,000 as liquidated damages, and this sum was first to be deposited as caution money. This agreement was not made without considerable correspondence between the parties, and in a letter dated the 15th of October, 1872, in reply to a request by the Defendant *Carlton* for an increased benefit on account of the postponement of the day of purchase, Messrs. *Duignan* wrote a letter containing the following paragraph, which is referred to in the judgment of Lord Justice *Cotton*:—

"We, of course, brought to the attention of the trustees your suggestion that any increase in the valuation and also the profits of the past year, minus interest on the purchase-money, should be deemed to belong to you as a further bonus for your trouble and risk. They, however, entertain a very strong objection to this. They are willing to give to the ultimate purchaser the advantage of these two items, and by so doing to put you in a position to offer the income to the public on terms so favourable as very greatly to narrow the risk of the property being left on your hands; but they do not think they should be asked to increase the very handsome percentage first proposed to be allowed you. As far as their own trust is concerned, the result is of course the same, whether the benefit of these two items be taken by you or the purchasers; but in the possible event of their testator's estate being ultimately administered under the direction of the Court of

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Chancery, they would feel great difficulty in justifying so very large a discrepancy between the nominal purchase-money and that actually received by them. Besides which they are naturally anxious for the success of the new company, and if the advantages under which they expected now to start are to be intercepted, they feel that they could not either retain any connection with it or be the means of recommending it to others. We trust, therefore, that on reconsideration you will not press for any alteration in this respect. If you require these further advantages, the only way will be for you to buy of the trustees at the net sum which they were content to receive, and then make your own bargain with the promoters of the company."

About this time *Carlton* applied to the Defendant *Albert Grant* to join him in the enterprise, and to undertake the risk of getting up the company. After some negotiation it was agreed, in February, 1873, between the Defendants *Grant*, *Carlton*, and the *Richardsons*, that *Grant* should undertake the whole risk and expense of getting up the company, and should advance *Carlton* the deposit of £20,000; and that as a compensation for his services he should receive £65,000; and *Carlton* £20,000, out of which however he was to pay *Richardson* £10,000.

It did not appear that the vendors or their solicitors had any knowledge of these arrangements, and on the face of the transactions they dealt with *Carlton*, *Richardson* appearing as his associate in the matter. Two agreements were drawn up and executed on the 6th of March, 1873. The first, the purchase agreement (in the bill called the ostensible agreement), was made between *R. S. Bagnall*, *W. S. Nayler*, and *J. Nayler*, trustees and executors of the will of *James Bagnall*, of the one part, and the Defendant *G. Bytheway*, as a trustee on behalf of the intended joint stock company, of the other part, and thereby the trustees agreed to sell, and *Bytheway*, on behalf of the intended company, agreed to purchase, the good-will of the business and the collieries and property at *Gold's Hill*, with the plant, stock, and effects thereon, for the sum of £290,370, payable as therein mentioned, namely, £40,000 in cash, on the 15th of April, 1873, £110,370 in bills and promissory notes of the company, and

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£140,000 in debentures of the company. The agreement contained various stipulations for carrying out the purchase, and among others that the company should have an option before the 15th of May, 1873, of requiring, a re-valuation of the stock, and that the difference should be deducted from or added to the purchase-money; and that the title to the property should be investigated and approved by Messrs. *Duignan & Lewis*, as solicitors on behalf of the company.

The second agreement of the same date, the commission agreement (in the bill called the secret agreement), was made between the Defendant *Carlton* of the one part, and the Defendants *R. S. Bagnall, W. S. Nayler*, and *J. Nayler* of the other part, and thereby it was agreed that *Carlton* should before the 1st of April, 1873, form and cause to be registered a joint stock company to be called "*John Bagnall & Sons, Limited*," with the capital therein mentioned; that the company should on or before the 15th of April, 1873, execute under their common seal the before-mentioned agreement of even date, which was set forth in a schedule thereto, and should pay the sums of £40,000 and £110,375 therein mentioned, and that *Carlton* should immediately pay to the trustees the sum of £20,000 as a security for the performance of the agreement on his part. And the trustees agreed to pay to *Carlton* for his trouble and expenses in the negotiation and procuring the formation of the company the sum of £60,000, together with £25,000 in respect of the profits of the business from the 30th of September, 1871, the day when the valuation was made.

A third agreement was also executed on the same day between Messrs. *Grant Brothers* of the one part, and the Defendant *Carlton* of the other part, in which *Grant Brothers* agreed to indemnify *Carlton* against all liability under the agreement of even date, and *Carlton* agreed to pay them all moneys which he was entitled to receive under that agreement, except the sum of £20,000, which he was to retain for himself. This agreement was not communicated to the vendors or their solicitors.

These agreements being signed, the Defendant *J. Richardson* invited several persons, among whom were Mr. *Sampson Lloyd*, jun., Mr. *Hanbury Barclay*, and Mr. *Edward Gem*, to become directors of the company. A skeleton prospectus was prepared by

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Messrs. *Duignan & Lewis*, and sent to *Carlton* and the *Naylers* that they might fill up the blanks. At that time Messrs. *Duignan & Lewis* did not know that the Defendant *Grant* was concerned in the matter, but the draft was sent by *Carlton* to him for approval. Messrs. *Lloyd, Barclay, & Gem*, after some negotiation, consented to become directors of the company on the 15th of March, 1873, and *W. S. Nayler* and *J. Nayler* also consented, but Mr. *R. Bagnall* declined on the ground that he wished to be relieved from business. Messrs. *Lloyd, Barclay*, and *Gem* were informed of the purchase agreement of the 6th of March, 1873, but not of the commission agreement with *Carlton*.

The memorandum and articles of association were dated the 15th of March, 1873, and the company was registered on the 21st of March. The first directors were *Hanbury Barclay, Edward Gem, Sampson Lloyd*, jun., *W. S. Nayler*, and *J. Nayler*. The object of the company was stated to be, among other things, the carrying into effect the agreement of the 6th of March, 1873, between the trustees and *Bytheway* (the purchase agreement), and carrying on the business of ironmasters, coal miners, and kindred occupations. The capital was to be £300,000, divided into 30,000 shares of £10 each.

The prospectus gave the names of Messrs. *Duignan & Lewis* as solicitors for the company, and was signed by the Defendant *Charles F. Richardson* as the secretary. At the foot of the prospectus was this memorandum: "The following contract has been entered into on behalf of the company:—An agreement dated the 6th of March, 1873, between *R. S. Bagnall* and *W. S. Nayler* and *J. Nayler*, trustees of the late *James Bagnall*, of the one part, and *G. Eytheway* of the other part." No mention was made of any other contract.

As soon as the company was established the Defendant *Grant* was at considerable expense in circulating the prospectus and in advertising and recommending the company. In his evidence he estimated the expense incurred in advertising as about £3185; in printing and postage £1540; and in incidental expenses about £1000. He also paid Messrs. *Duignan & Lewis* £525 which had been agreed upon as their fee for their professional services in investigating the title and carrying through the purchase.

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A large number of shares were taken, and cash and debentures representing the purchase-money were paid by the company in accordance with the agreement mentioned in the prospectus, and the company entered into possession of the property. Out of the cash and debentures so paid, Messrs. *Duignan & Lewis*, as solicitors for the vendors, paid to *John Richardson* £85,000 in cash and debentures, and repaid the sum of £20,000 which had been deposited by *Grant* on behalf of *Carlton*. Of this sum of £85,000, £65,000 was paid by *J. Richardson* to *Grant*, £10,000 to *Carlton*, and £10,000 retained by *J. Richardson* and by him brought into his partnership assets. Ultimately, however, *Carlton* appears to have received £12,500, and Messrs. *Richardson* £7500 only. Two debentures of £500 each were also given by *Grant* to *W. S. Nayler* and *J. Nayler* to induce them to act as directors.

In April, 1873, *John Richardson* was appointed a director and became chairman of the company.

In January, 1874, *W. S. Nayler* died, having appointed *J. Nayler* and *Edward Nayler* his executors, and *Edward Nayler* was soon afterwards appointed a director.

Soon after the formation of the company the directors ascertained that a serious accident had happened to some of the works at *Gold's Hill*, before the purchase by the company, which they estimated at about £7000, and they applied to *Bagnall's* trustees to make good the loss, which they refused to do.

On the payment of the purchase-money to the vendors, *Duignan* applied to *R. Bagnall* to pay him the £1500 which had been promised him if he obtained a purchaser for the property, and on *R. Bagnall* refusing to pay, brought an action against him for the money. He eventually submitted to pay the money, and notice of trial of the action was withdrawn in July, 1873.

In consequence of this action, or for some other reason, the directors, other than *J. Richardson* and the *Naylers*, became suspicious as to the transactions prior to the purchase by the company, and a meeting of the board was called on the 2nd of December, 1874, to consider the subject. At that meeting Mr. *W. H. Duignan* informed the meeting of the commission agreement of the 6th of March, 1873, and a few days afterwards, with the consent of *Bagnall's* trustees, he furnished them with a copy of it.

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In consequence of this disclosure the directors called a meeting of the shareholders on the 27th of January, 1875, at which a committee of investigation was appointed, and on the 20th of May their report was presented to a general meeting. The committee reported that neither of the directors *Barclay*, *Gem*, and *Lloyd* had any knowledge of the commission agreement till it was disclosed to them in December, 1874, and that it was purposely concealed from them and from the shareholders. They also reported that £85,000 had been paid to Mr. *Carlton*, £1500 and £525 to Mr. *W. H. Duignan*, but that Mr. *Duignan* stated that the sum of £1500 was paid to him by Mr. *R. Bagnall* in pursuance of an arrangement made with him in April, 1872, when that gentleman promised to pay that amount in addition to any professional charge if a sale of the property were effected to his satisfaction; and that Mr. *Duignan* explained the payment of the £525 by saying that at an interview with Mr. *Carlton* in February, 1873, he had, at Mr. *Carlton's* request, consented to act for the company in investigating the title to the property on payment of five hundred guineas for his professional services.

The result of the committee's report was that the present bill was filed by the company on the 1st of July, 1875, Messrs. *Tucker & Lake* acting as solicitors for the company in the suit, although Messrs. *Duignan & Lewis* remained solicitors for the company's general business for some time afterwards.

All the Defendants, except *Bytheway*, put in answers to the bill, denying that they were promoters of the company, or that they had in any way contracted any fiduciary relation with the company, and alleging that the total price paid by the company was below the then value of the property, a statement which was not disputed by the Plaintiffs.

On the 24th of February, 1876, the Plaintiff company entered into a compromise with the Defendants *R. Bagnall* and *R. S. Bagnall*, by which, in consideration of the payment of £31,000, the Plaintiffs abandoned all claim for relief against them by rescission of the contract or for costs, except as therein provided, and agreed to consent to an order staying proceedings against them.

The Plaintiffs, having effected this compromise, offered to refrain from asking for a decree against *Duignan & Lewis* if they

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would assist them in their proceedings against the other Defendants. Messrs. *Duignan & Lewis* declined to accede to these terms, but offered to consent to the bill being simply dismissed against them without costs. The Plaintiffs, however, proceeded with the suit against them.

The Plaintiffs stated in the bill that they did not seek to impeach the payment of the £525 to *Duignan & Lewis*, but they claimed to be repaid the other sums, namely, the £1500 paid to *Duignan & Lewis*, the £20,000 paid to *Carlton*, and the £65,000 paid to *Grant* (including the £1000 paid to the *Naylers*), "except so much of the said sums as represented a fair remuneration for services rendered or expenses paid on behalf of the intended company." The bill prayed that the agreement for the purchase of the property might be set aside, and for an injunction to restrain the Defendants, other than *Bytheway*, from dealing with the debentures of the company; or that the Defendants, other than *Bytheway*, might be decreed to be jointly and severally liable to repay the sums claimed, after deducting such sum as should be determined by the Court to be a fair allowance for commission, and expenses properly incurred.

The Defendant *J. Richardson* died before the cause came to a hearing.

The cause came on for hearing before Vice-Chancellor *Bacon* on the 7th of March, 1877.

The parties to the suit and other witnesses were examined at the trial at great length before the Vice-Chancellor.

Kay, Q.C., *Fry*, Q.C., and *Russell Roberts*, appeared for the Plaintiffs.

Swanston, Q.C., and *Ingle Joyce*, for the Defendant *Carlton*.

Sir *H. Jackson*, Q.C., and *Everitt*, for the Defendant *Grant*.

Hemming, Q.C., *Cozens-Hardy*, and *Moulton*, for the Defendants *Duignan & Lewis*.

W. W. Karslake, for the Defendant *C. F. Richardson*.

Westlake, Q.C., and *C. T. Simpson*, for the Defendant *J. Nayler*.

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Millar, for the Defendant *E. Nayler*.

Woodroffe, for the Defendants *R. Bagnall* and *R. S. Bagnall*.

Kay, in reply.

The following cases were cited:—*Imperial Mercantile Credit Association* v. *Coleman* (1); *Gover's Case* (2); *New Sombrero Phosphate Company* v. *Erlanger* (3); *Lindsay Petroleum Company* v. *Hurd* (4); *Panama and South Pacific Telegraph Company* v. *India Rubber Company* (5); *Great Luxembourg Railway Company* v. *Magnay* (6); *Kimber* v. *Barber* (7); *Knight* v. *Bowyer* (8); *Oakes* v. *Turquand* (9); *Bank of London* v. *Tyrrell* (10); *Dunne* v. *English* (11); *Clarke* v. *Dickson* (12); *Fawcett* v. *Whitehouse* (13); *Craig* v. *Phillips* (14); *Morgan* v. *Elford* (15); *In re Hereford and South Wales Waggon Company* (16); *Land Credit Company of Ireland* v. *Fermoy* (17); *Barnes* v. *Addy* (18); *McKay's Case* (19); *In re Kensington Station Act* (20); *Pearson's Case* (21); *Peek* v. *Gurney* (22); *Orgill's Case* (23); *Hay's Case* (24); *Carling's Case* (25); *In re Bampton and Longtown Railway Company* (26); *Parker* v. *McKenna* (27); *Overend, Gurney, & Co.* v. *Gibbs* (28); *Phosphate Sewage Company* v. *Hartmont* (29).

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BACON, V.C., after stating the facts above detailed, continued:—

Some of the Defendants have insisted that the Plaintiffs' title to relief is barred by laches, delay, and acquiescence. But, con-

(1) Law Rep. 6 H. L. 189.
(2) 1 Ch. D. 182.
(3) 5 Ch. D. 73.
(4) Law Rep. 5 P. C. 221.
(5) Ibid. 10 Ch. 515.
(6) 25 Beav. 586.
(7) Law Rep. 8 Ch. 56.
(8) 2 De G. & J. 421.
(9) Law Rep. 2 H. L. 325.
(10) 27 Beav. 273; 10 H. L. C. 26.
(11) Law Rep. 18 Eq. 524.
(12) E. B. & E. 148.
(13) 1 Russ. & My. 132.
(14) 3 Ch. D. 722.
(15) 4 Ch. D. 352.
(16) Law Rep. 17 Eq. 423.
(17) Ibid. 5 Ch. 763.
(18) Ibid. 9 Ch. 244.
(19) 2 Ch. D. 1.
(20) Law Rep. 20 Eq. 197.
(21) 4 Ch. D. 222.
(22) Law Rep. 6 H. L. 377.
(23) 21 L. T. (N.S.) 221.
(24) Law Rep. 10 Ch. 593.
(25) 1 Ch. D. 115.
(26) Law Rep. 10 Eq. 613.
(27) Ibid. 10 Ch. 96.
(28) Law Rep. 4 Ch. 701; Ibid. 5 H. L. 480.
(29) 5 Ch. D. 394.

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sidering the time at which the Plaintiffs had any certain knowledge of the facts on which they rely, and that they have ever since pursued, not without difficulty, the inquiries which were requisite, I do not think any unreasonable delay can be imputed to them, or that there has been on their part anything like laches, or anything done or left undone by them in respect of which it can be said that either of the Defendants has suffered any prejudice. And it is not even suggested that from the time at which their suspicions were first aroused, either the directors or the company have acquiesced in the things which are now complained of, or that with that full knowledge which is necessary to constitute acquiescence, in the sense in which the expression is properly used, they have forborne, or led any of the Defendants to imagine that they intended to forbear, their claim to the relief they seek.

The facts which I have heretofore recapitulated are not in dispute between the parties to this action. I find it, therefore, unnecessary to dwell minutely upon the numerous letters which have been referred to in the course of the discussion, from which many of those facts are derived, or to the statements of the Defendants in their several answers, or to the purport of the lengthened examinations which have been made. The allegation of the Plaintiffs is, that each and every of the Defendants was a promoter of the company, and that as a necessary consequence it was the duty of each of them to disclose fully and truly the circumstances under which, and the terms upon which, the sale to the company had been effected. This being denied by the Defendants, it becomes necessary to consider first what constitutes a promoter of a joint stock company. The name is one of familiar use and application. It is found in several of the statutes relating to joint stock companies, and has been used and adopted by the Court in several cases. I think, therefore, that without attempting to define it in any more certain manner than the occasion requires, it will be sufficient to consider whether what was undertaken and done by the several Defendants can be referred to any other character than that of promoters. It is a fact undisputed that from the very first suggestion of a sale of the business and property, the subject of this action, it was the con-

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viction and intention of all the persons engaged or interested in the matter that they should be sold to a company. It may be truly said that the sale and the formation of a company formed one complete entire idea. It was the intention of *James Bagnall*—the same intention actuated his trustees after his death—and it was with the same intention that *Richard Bagnall*, the tenant for life, engaged the services of Mr. *Duignan*, with the promise of a gift to him of £1500 if he should succeed in effectuating such a sale—and for this purpose, and no other, the firm of *Duignan & Co.* were instructed and employed as the solicitors of the trustees, and acted in every step towards the accomplishment of that object. With this intention the communications were made by Mr. *Duignan* to Mr. *John Richardson*, and were by him made to Mr. *James Carlton*, and by *Carlton* to *Grant*; and it seems to me impossible to doubt that each of these persons—*Richard Bagnall*, the trustees of *James Bagnall's* will, Messrs. *Duignan & Lewis*, the two *Richardsons*, *Carlton*, and *Grant*—was employed and actively engaged in the formation of a joint stock company for the sole purpose contemplated by them. The negotiations with *Richardson* and *Carlton* were carried on by *Duignan & Co.*, and were communicated by them to the *Bagnalls*. The negotiations between *Richardson*, *Carlton*, and *Grant*, were carried on by them for the same purpose. The agreements entered into by the vendors were prepared by *Duignan & Co.*; the prospectus of the intended company was prepared by them, transmitted to Mr. *James Carlton*, and submitted to the trustees, and known to and not disapproved of by them, since one of them made pencil alterations in it. That *Richardson*, *Carlton*, and *Grant* were busily and earnestly engaged in the formation of the company, is abundantly proved, and most unequivocally admitted. In the face of these plain facts, I can find no room or reason for doubting that the persons I have named, each and every one of them, must be taken to have been promoters of the company, and to have carried into full and perfect completion their common design, that a company should be formed.

But, then, it is said, on the part of these Defendants, that if it should be held that they were, or that either of them was, promoting the company, it is not a necessary or a legal consequence that they thereby contracted any fiduciary relation with the company when

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formed; and this, being a topic of universal interest, and of great public importance, is worthy of the closest consideration. The general law relating to those institutions, which in recent times have become so numerous, is contained in the several statutes which have been passed relating to them, and which prescribe the manner in which such companies are to be formed, the regulations necessary for the protection of the public, and the rights, *inter se*, of the shareholders. But besides that, and in addition to those regulations, and neither inconsistent with, nor repugnant to, the special enactments, the general law prevails and must be resorted to for the purpose of deciding any matters which may arise, and in which the members of such companies may be interested. The formation of such companies must, from its very nature, be in almost all cases the work of one or more individuals. It begins usually in an announcement of the nature of the proposed enterprise, the means by which its purpose may be effected, the amount of the intended capital, and of the number of shares into which that capital is to be divided, and the names of the persons who, as directors, secretaries, solicitors, bankers, and others, are to be concerned in its establishment. This announcement is familiarly called a prospectus. Its object is to induce persons to contribute their money for the purposes of the enterprise, and with that intent the prospectus is advertised and circulated by the persons who have conceived and projected its formation, and by whom the prospectus has been edited. It is obvious that such a document ought to be expressed with perfect veracity, and issued in good faith; and the suppression or withholding the statement of any fact materially relevant, would be as plain a failure of that perfect veracity, and as plain a departure from good faith as the assertion of a positive falsehood. To sanction or to permit any violation or neglect of these essential conditions, would be to encourage proceedings which might soon prove intolerable, and would expose that numerous class of persons who are but too willing to invest their money in undertakings which seem to hold out a fair prospect of reasonable and honest profit, to the arts of projectors desirous of taking advantage of their credulity. The Courts of Law have, therefore, without hesitation, denounced the practice of issuing prospectuses which

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are untrue, and have declared the contract into which shareholders had entered in reliance upon the truth of such representations to be null and void, in case they turned out to be untrue, or delusive, or deficient in any of the conditions essential to the formation of a binding engagement; and the *Companies Act*, 1867 has, in express terms, enacted that any prospectus which shall omit to state the particulars of any contract entered into by the promoters before the issuing of such prospectus, shall be deemed to be fraudulent on the part of the promoters. The prospectus, which was in this case prepared by *Duignan & Co.*, approved of by the trustees, adopted and printed, advertised and circulated by *Grant*, on his own behalf and on behalf of *Richardson* and *Carlton*, was the direct means by which subscribers for shares in the company were procured. Can it be doubted that the persons who were engaged in this common action for their common purpose did thereby, and by force of the representations which the prospectus contained, invite the persons to whom it was addressed to trust to its statements? Its very end and object was that it should be trusted; it solicited the confidence of the shareholders; the shareholders did trust it, and they now discover that the authors of the prospectus were each of them engaged in a transaction by which the funds of the company were to be applied to a purpose not disclosed by the prospectus, and which each of its authors had a direct interest in concealing from those to whom it was most material that they should know the whole truth respecting the engagement they were invited to undertake. Many authorities have been referred to as bearing upon the questions to be decided. It has been expressly decided that an agent cannot bargain for any benefit derived from the subject on which he is employed without disclosing the fact to his principal. That Mr. *Carlton*, Mr. *Grant*, and Messrs. *Richardson*, were the agents of the vendors to procure the formation of the company by which the purchase was to be made, I think must be inferred from the correspondence and other evidence, notwithstanding the form of the written contracts; but that they were the agents, self-appointed, but none the less the agents of and for the intended company, appears to be clear, for everything they did was not for themselves personally—they had no intention of buying for

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themselves—but they engaged that other persons should buy; and when by means of the prospectus they had accomplished this intention, they procured the company for which they had been so acting, to adopt and confirm the bargain they had made, without disclosing to them the terms upon which it had been made. The law I take to be clear, that under such circumstances an agent, whatever may be the nature of his employment, or under whatever circumstances, is bound, if he has any interest in the matter, not only to declare that fact, but to specify the nature of his interest; and that all persons who act with him, and who share in that interest, are jointly and severally bound to make good, when their interest is discovered, to the principals, the whole benefit which has been obtained without the sanction of the principals: *Imperial Mercantile Credit Association* v. *Coltman* (1). The fact that there were two agreements, one of which was published, while the other was not, as it was intended that it should not be disclosed, may be accounted for by the mistaken notion of law which seems to have been entertained, and which is not even now relinquished by the parties engaged. But it is, nevertheless, wholly inexcusable, and justifies me in adopting the words of the judgment of the Privy Council in *Lindsay Petroleum Company* v. *Hurd* (2), which is thus expressed: "It is difficult to conceive anything more clearly fraudulent than for the owners of property to arm a person whom they knew to be about to endeavour to find others to take up a purchase, whether as a company or otherwise, with a document purporting to be an offer made by themselves, as owners, to sell at a fictitious price, at which price he is to propose to other people to take up and to accept that offer as if it were the real one. If that be not the real price which the owners of the property expect to get, and if they are parties to an arrangement that the intermediate agent, who is to induce others to accept the offer, is himself to put a considerable part of the nominal price into his own pocket, without any communication of the facts, the document is a dishonest and false document upon the face of it, representing no real transaction, but evidently representing a false transaction only in order to deceive somebody." It is not necessary to multiply references to decided cases, many of which were referred

(1) Law Rep. 6 H. L. 189. (2) Law Rep. 5 P. C. 243.

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to in argument, but in one of the most recent decisions, *New Sombrero Phosphate Company* v. *Erlanger* (1), I find his Lordship, the Master of the Rolls, holding (2) that the prospectus was the act of the promoters—"that promoters stand in a fiduciary relation to that company which is their creature"—and declaring that persons in "a fiduciary position must make a full and fair disclosure when they are about to sell property to those towards whom they stand in that relation." I find, moreover, that another of the learned Judges by whom that case was decided (*James*, L.J.), says (3): "A promoter is, according to my view of the case, in a fiduciary relation to the company which he promotes or causes to come into existence. If that promoter has a property which he desires to sell to the company, it is quite open to him to do so; but upon him, as upon any other person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to that property. I can see no difference in this respect between a promoter and a trustee, steward, or agent." But if the case were not supported by authority, I should not hesitate to say that the persons by whom this representation was made did, by making it—by inviting and soliciting the confidence of the persons to whom it was addressed—contract fiduciary relations with those persons; that by reason of those relations they were, in all justice, bound to disclose the fact that each of them had bargained to retain for themselves a large proportion of the moneys to be subscribed; that Messrs. *Duignan & Co.* were to be paid £1500 for the share they had taken in promoting the company, whether or not that was to be paid by Mr. *Richard Bagnall* or out of the funds of that company; that Mr. *Grant*, and Messrs. *Richardson*, and Mr. *Carlton*, were to take between them £85,000 out of the money subscribed; and that out of the same money the Messrs. *Nayler* were each to have a debenture of the company for £500.

One of the numerous grounds on which the Defendants rely, and which may be said to be common to all of them, was that the vendors were at liberty to employ such agents as they thought fit to effect the sale, and to agree for and pay them such remu-

(1) 5 Ch. D. 73. (2) 5 Ch. D. 112.
(3) 5 Ch. D. 118.

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neration for their services by way of commission as they might determine; and that this was a matter which concerned only the vendors and their agents, and that none of them were in any sense blameable for not having disclosed the terms of a bargain which concerned only themselves; and it was upon this ground that the two separate agreements were justified, and that Mr. *Duignan* relied, when he expressed the opinion that neither the 38th section of the Statute of 1867, nor any other rule of law, required that what has been called the secret agreement ought of necessity or in propriety to have been disclosed. But although this may have a certain air of plausibility, and it might be true if the vendors and their agents were the only persons concerned in the transactions, it is wholly fallacious when applied to the facts of this case. It wholly omits the consideration that the employment of the agent was for the purpose of forming a company, and of inducing other persons to subscribe in reliance upon a representation which was untrue; for it was not true that the purchase-money payable to the vendors was the sum mentioned in the prospectus, but it was the purchase-money stated in the ostensible agreement, minus the amount to be paid by the vendors to their agents as a reward for procuring the subscription; and the nominal purchase-money so diminished was the true sum which was to go into the pocket of the vendors. It is upon this erroneous view of the duty of the promoters that the several Defendants rely. Mr. *Carlton* insists upon it, and contends that the sum he bargained for was no more than a fair compensation for the risk he ran in engaging to deposit £20,000 as a guarantee that the shares required for the formation of the company should be taken by subscribers, and that his subsequent transactions with Mr. *Grant* concerned themselves alone, and that by means of such transactions he had justly acquired the sum stipulated between them; and having transferred the formation of the company to Mr. *Grant*, by whom the further proceedings were carried on, he, *Carlton*, had nothing further to do with the matter. Mr. *Grant*, who, by his answer and by means of his evidence, states with the utmost frankness the part which he and the persons connected with him took in the formation of the company, does not dispute any of the matters of fact alleged by the Plaintiffs,

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but insists that he was justly entitled to acquire the amount for which he stipulated, and which he received, as a compensation for his risk and exertions, and says he would not undertake a similar affair but upon much more advantageous terms. Mr. *Charles Richardson*, who has survived his father and partner, adopts a similar line of defence. He was personally cognisant of, and an actor in, the proceedings connected with the agreement and the formation of the company, and was named in the prospectus as secretary; he prepared and circulated the letter of invitation to subscribers which accompanied the prospectus, and he continued to fill the office of secretary up to some time in the month of July, 1873; and £10,000, part of the purchase-money was received and retained by his partner on their joint behalf, and by reason of their having acted as promoters, and without the knowledge of the company. Mr. *Joseph Nayler*, and the representative of the late *William Sutton Nayler*, deny that they had any share in the promotion of the company—a point of which I have disposed—and allege that the two debentures of the company which were received by them from *Grant* were so received as a compensation for the reduction which had been made by the directors in the amount of the salaries they were to receive as managers, and not in consideration of their becoming directors of the company. In point of fact, they had previously insisted upon the payment to them by *Richard Bagnall*, on the completion of the purchase, of two sums of £6000, and an annuity of £500 each for a term, as the condition of their signing the agreement of the 6th of March, 1873; and upon its being proposed that they should become managing directors of the company, they declined to do so unless the agreement with *Richard Bagnall* was confirmed by him, and unless they received the two debentures. Their demands were complied with, and *Richard Bagnall* confirmed the agreement; Mr. *John Richardson* obtained from Mr. *Grant* the two debentures, which were handed to them, and they then consented to become, and became, the managing directors of the company. It has been argued on the part of the representative of *William Sutton Nayler*, that the Plaintiffs can have no relief against him in respect of this transaction, for that if they had any claim against him, which is denied by his representative, it was a personal demand only; and

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he having died the cause of action died with him. I am, however, of opinion that this ground of defence fails, inasmuch as the Plaintiffs claim in respect of a breach of trust, and that being established, his estate remains as liable as he would be if he were still alive; as, in fact, was decided in the *New Sombrero Phosphate Company* v. *Erlanger* (1), in respect of the representatives of one of the original actors in the matter; and these two debentures, the property of the company, having been obtained by the Messrs. *Nayler* as the price of their becoming directors, *Joseph Nayler* cannot retain that which he has received, and the estate of *William Sutton Nayler* is liable to restore that which was received by him. The Plaintiffs have insisted that they are entitled to charge the two *Naylers* with all such sums as may have been received by them under their agreement with Messrs. *Bagnall*, which agreement is said to be a subject of litigation between the parties. The Messrs. *Nayler* allege that this agreement was not connected with the purchase (except that it was to take effect on the completion of the purchase), and that it constituted a merely personal engagement on the part of the *Bagnalls*, and was to be satisfied by *Richard Bagnall* out of his own moneys. Upon such evidence as is before me, I cannot see that the Plaintiffs' contention in this respect is established, or that the Defendants, Messrs. *Nayler*, are chargeable with more than the two sums of £500 received by them from Mr. *Grant*.

With respect to the £1500 which was obtained by Messrs. *Duignan & Co.* from *Richard Bagnall*, and the refunding of which is claimed by the company, it appears to me that this claim cannot be sustained, because that sum never formed any part of the funds of the company, but was paid, as it is said, by *Richard Bagnall*, in respect of the personal liability which he had contracted with Mr. *Duignan*, and out of his own pocket. That it was promised and was paid in remuneration of the services of the firm in promoting the company, is, I think, established; that the same firm did perform such services is clear; that they did engage with Mr. *Carlton*, in consideration of another sum of 500 guineas, to investigate on behalf of the company the title of the vendors, is clear; and that with their full knowledge and assent they were

(1) 5 Ch. D. 73.

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advertised and acted as the solicitors of the company is clear. It is equally clear that under these circumstances they wholly failed to communicate to the company, they had undertaken to serve, the nature of the secret agreement, although in a letter of Mr. *Duignan* to *John Richardson*, speaking of the drafts he had then "sketched," he wrote, "the drafts are framed, having special regard to all the circumstances, and that they will have to be referred to in the prospectus." The fact from which this conclusion is drawn is not disputed by them, but they assert that it was not necessary that they should make the disclosure. I cannot, however, hesitate to say that they appear to me to have mistaken their legal obligation to their clients, and that, being the hired and paid promoters of the company, and being and acting as the solicitors of the company before and after it was formed, they have failed in the discharge of the duty which was involved in their relation to the company, and that they and the other Defendants have combined in common action, and for a common purpose, to induce the company to believe that they were purchasing from the vendors at the price mentioned in the contract, when, in fact, that price was less by the amount which was received by the other promoters.

On the whole, I have come to the conclusion that the sum of £85,000, which has been so received, cannot be retained by the persons by whom it was received, but that the Defendants *Carlton* and *Grant* must be declared to be jointly and severally liable to pay to the Plaintiffs the same £85,000, with interest at 4 per cent. per annum from the 26th of April, 1873; and that it must be further declared that the Defendant *Charles Fletcher Richardson* is also liable to pay to the Plaintiffs the sum of £10,000, part of the said sum of £85,000, with interest from the same day at 4 per cent. per annum until payment; and that the Defendant *Joseph Nayler* is also liable to pay to the Plaintiffs the sum of £500, part of the said sum of £85,000, with interest at the like rate from the 9th of July, 1873, until payment; and that the Defendants *Edward Nayler* and *Joseph Nayler*, as legal personal representatives of *William Sutton Nayler*, deceased, are also liable to pay to the Plaintiffs the sum of £500, part of the said sum of £85,000, with interest at the like rate from the 9th of July until payment. If the last-named Defendants do not admit assets, the usual admi-

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nistration accounts must be taken of their testator's estate. The decree will direct payment of those several amounts within a time to be fixed, and it will also declare that the liability of the several Defendants to pay any portion of the sums for which they are respectively declared to be liable may be discharged by such Defendants transferring to the Plaintiffs debentures of the Plaintiff company, which have been received by the Defendants under the conditions in the bill mentioned, and by accounting to the Plaintiffs for the interest which may have been received by the Defendants on such debentures. It has been suggested in the course of the arguments by some of the Defendants, but not put forward in any of the pleadings, that even if the judgment of the Court should be adverse to them, they are entitled to have allowed to them a fair commission for their respective services in and about the establishment of the company, and this the more especially because the Plaintiffs offer by their bill to allow such sum in that respect as the Court shall think reasonable. The Plaintiffs, however, now that the cause has been fully heard, desire to withdraw that offer, and insist that they are not bound by it, since the Defendants, by their answers, and by the defences they have set up, deny the Plaintiffs' title to any relief; and the Plaintiffs further insist that the Court cannot in reason and justice make any allowance for such commission. I am of opinion that I cannot entertain this suggestion of the Defendants. I can resort to no means of ascertaining what would be a fair commission. The Defendants suggest that the whole amount which has been retained by them is not more than a fair commission for their services. I know of no standard or tariff by which such commission could be ascertained, and no evidence has been adduced on the subject of any allowance. But, besides this, I am of opinion that a commission to be allowed must be founded upon some species of contract, of which there is no trace in the case before me; and, moreover, it would neither be just nor reasonable that a commission should be paid by the company to persons who have signally failed in the discharge of duties which, as promoters, they ought to have fulfilled. It remains only to dispose of the costs up to the hearing; and as to them I think the Defendants, except the Defendant *Bytheway* (who is merely a nominal party who has

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not appeared, and against whom no relief is asked, and except the Defendants *Bagnall* who have already compromised), having been engaged together as promoters are jointly and severally liable to pay those costs to the Plaintiffs.

C. A.

From this decision the Defendants *Grant*, *Carlton*, *Duignan*, *Lewis*, and *Richardson* appealed. The appeal came on for hearing on the 3rd of August.

Argument.

Sir *H. Jackson*, Q.C., and *Everitt*, for the Defendant *Grant*:—

In the present case several of the elements are absent which induced the Court to give relief in other cases. There is no question as to the application of the 38th section of the *Companies Act*, 1867. There is no proof of any fraud or misrepresentation on the part of the Defendants, and all such charges have been now abandoned by the Plaintiffs. The statements in the prospectus were perfectly true; the valuation of the property was fairly made; nor was there rigging of the market or any unfair practice in order to induce the public to take the shares. The only ground on which the Plaintiffs base their claim to relief is that there was a fiduciary relation between the Defendants and the company. But so far as the Defendant *Grant* was concerned it is difficult to understand how any such relation could exist between him and persons who had never trusted him. He had never made any representation to them. His connection with *Carlton* was merely a private arrangement with him, and had no influence upon those who joined the company, for they knew nothing about it. He was the agent of the vendors, and not of the company. The company was not formed at the time when his services were engaged, therefore he could stand in no fiduciary relation towards it. But if it had been formed he would have owed no duty to it. There is nothing fraudulent in a man who goes to a company and tells them that he can get them property at a certain price, and sells it to them at that price, concealing from them that he is getting a profit from the sale. The Plaintiffs assert that *Grant* was a promoter of the company, and they rely upon *New Sombrero Phosphate Company* v. *Erlanger* (1) as establishing that every

(1) 5 Ch. D. 73.

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promoter of a company stands in a fiduciary relation to the company, and can make no profit by his services. But, in the first place, *Grant* was not a promoter at all. He had nothing to do with the company till it was established. But admitting that he was a promoter in some sense, there is a distinction between what may be called an internal promoter and an external promoter, who is merely paid for his services like an engineer or a solicitor. In the case of *New Sombrero Phosphate Company* v. *Erlanger* (1) the Defendants were admitted to be internal promoters; the directors were nominated by them. *Grant* was not in such a position. He was the agent of the vendors on a *del credere* commission. If it had not been for the large amount paid to him, nothing would have been heard of the case. But the money was well earned, for the risk and responsibility he undertook were enormous. It would be carrying the doctrine laid down in the case cited to an absurdity to say that all persons who in any way contributed to the formation of a company were in a fiduciary relation to it. In the *Lindsay Petroleum Company* v. *Hurd* (2) also the fiduciary relation of the Defendants towards the company was admitted.

[COTTON, L.J.:—Is it not immaterial whether *Grant* was a promoter or not? The real question seems to be whether the company was not entitled to have the benefit of the real instead of the nominal contract.]

The contract with *Bytheway* was the real contract. What is called the secret contract had nothing to do with the company. It was an agreement between the vendors and their own agent.

We also contend that the Plaintiffs have put themselves out of Court by compromising the suit with the vendors, and giving up their claim to rescind the contract. They cannot confirm the contract and also recover against *Grant* on the ground that the contract was fraudulent. At all events, the sum of £31,000 which the Plaintiffs have received from the vendors must be deducted from any sum which *Grant* is liable to pay to them. Otherwise they will be getting more than the worth of the property. If the cause had come to a hearing before the compromise, *Grant* might

(1) 5 Ch. D. 73. (2) Law Rep. 5 P. C. 221.

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Argument.

have offered to pay back the whole purchase-money, and so put himself in the position of the vendors. They cannot deprive him of this right.

Lastly, we complain that the Vice-Chancellor refused to allow *Grant* the expenses which he had incurred on behalf of the company, and a fair commission, although the Plaintiffs had offered in their bill to allow them. *Grant* is fairly entitled to these allowances, and even if this were doubtful the Plaintiffs are bound by their offer.

Swanston, Q.C., for the Defendant *Carlton*:—

The defence relied on by *Grant* is equally applicable to *Carlton*. Indeed the facts proved are still more favourable to *Carlton* than to *Grant*; for he was not a professional financier, and simply acted as the vendors' agent to find them a purchaser for the property. Neither he nor *Grant* received any money from the company nor out of the company's funds, nor did they select any of the directors. They had no more to do with the actual getting up of the company than *Bytheway* had. The directors themselves admit, in their answers to the interrogatories exhibited by the Defendants, that they understood that the *Bagnall* trustees paid all expenses and commission. They knew that some persons had a commission, although they might not know their names or the amount paid. The real question is whether a vendor may not pay an agent or broker what he pleases, and whether the agent is bound to tell the purchaser what he has received. The Plaintiffs say that the public would not have joined the company if they had known that so large a bonus had been paid to the vendors' agents. What then? This is not an action by shareholders, who may have their statutory remedy under the Act of 1867 if there has been any violation of the Act, but an action by the company based upon fraud. There can be no fraud without some falsehood or misrepresentation, of which there is here an entire absence. The decree of the Vice-Chancellor is most unjust in refusing commission and just allowances. Both *Grant* and *Carlton* undertook a great risk. It was almost impossible to get any man to undertake such a responsibility, and yet the Vice-Chancellor has stripped them of all profit and reward. It is absurd to suppose

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that men will undertake work of so responsible and difficult a nature for mere philanthropy.

The Defendant *W. H. Duignan*, who had leave to appeal on the question of costs, appeared in person:—

The Vice-Chancellor has granted no relief against my partner and myself, but has made us liable for the Plaintiffs' costs. We therefore appeal from his decision, which not only inflicts a great pecuniary loss on us, but casts a slur on our professional character.

We acted entirely *bonâ fide*, and no complaint is made against us except that we did not disclose the secret contract of the 6th of March. But that contract was not a contract binding or affecting the company, and was not therefore within the 38th section of the Act of 1867; and whatever may now be the result of the authorities, no one at the time had any notion that there was anything fraudulent in not disclosing the private arrangements between the vendors and their agents, or that the vendors' agents had any fiduciary relation towards the intended company. We acted as the vendors' solicitors exclusively till after the company was formed. We drew a skeleton prospectus, and revised the prospectus, on behalf of the vendors and *Nayler*, not of the company. We investigated the title on behalf of the promoters of the company under a special arrangement; but we had no idea at that time of acting generally as the solicitors of the company. When appointed solicitors for the company it was not our duty to disclose the affairs of our former clients. Whether as solicitors for the vendors or for the company, we performed our duty to the best of our power, and no action will lie against solicitors unless for gross ignorance or negligence. It is an abuse of the process of the Court to make solicitors parties for the purpose of making them pay costs: *Purves* v. *Landell* (1); *Morgan* v. *Elford* (2); *Barnes* v. *Addy* (3). The money which we received, namely, £1500 from *R. Bagnall* and £525 from the company, was fairly earned by us and ought not to be refunded: *In re Hereford and South Wales Waggon Company* (4); *Albion Steel and Wire*

(1) 12 Cl. & F. 91.
(2) 4 Ch. D. 352.
(3) Law Rep. 9 Ch. 244.
(4) 2 Ch. D. 621.

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Company v. *Martin* (1). With respect to our conduct before the formation of the company, the Plaintiffs have in fact waived all claims against us by compromising the suit with the vendors, and abandoning their claim to rescind the contract. For if the contract is upheld we are free from blame for negotiating it. And when the compromise was agreed upon, we ought to have been dismissed at once, and we were willing to consent to be dismissed without costs; but the Plaintiffs wished to bind us to assist them in the suit against our co-Defendants, a thing which we could not honourably do. As to our conduct as the solicitors of the company, the Plaintiffs themselves shew that they had no great cause of complaint against us, for they continued us as their solicitors for some time after the institution of the suit.

The Defendant *Lewis*, in person, supported the same views.

The Defendant *C. F. Richardson* also appeared in person:—

The business was managed by my father, and he received the £10,000. I had very little part in it, and only acted as secretary for a short time until a permanent secretary could be appointed. Our firm simply acted as brokers for the vendors. We were not promoters in any sense; and the directors knew that we were simply brokers, and that we were paid for our services. It never occurred to us that it was our duty to disclose to the directors the agreement between the vendors and *Carlton*.

JAMES, L.J.:—We feel no doubt that the Defendants *Grant* and *Carlton* are liable to repay the profits which they made by this transaction. But we desire to hear the counsel for the Respondents on the following points:—

1. Whether credit ought not to be given to the Defendants for the sum paid to the Plaintiffs by the vendors under the compromise of February, 1876, in satisfaction of the Plaintiffs' claim to rescind the contract.

2. Whether credit ought not to be given to the Defendants for the costs, charges, and expenses incurred in bringing out the company, and for a fair commission.

3. Whether the Defendants *Duignan & Lewis* ought to be made

(1) 1 Ch. D. 580.

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liable for the costs of the suit, and whether they ought not to have costs.

4. Whether the Defendant *C. F. Richardson* ought to be made liable at all.

Kay, Q.C., and *Davey*, Q.C. (*Russell Roberts* with them):—

With respect to the Defendant *Richardson*, it appears from the evidence that the £10,000 paid to his father went into the partnership assets.

[They were stopped upon this point.]

Secondly, with respect to *Duignan & Lewis*. They were cognizant of the negotiations which led to the secret agreement from their commencement, and assisted in the preparation and carrying out of the agreement. They also assisted in the preparation of the prospectus of the company, and knew that they were to be the solicitors of the new company. The investigation of the title to the property was also intrusted to them. If, therefore, the secret agreement was a fraud upon the company they were participators in it. When they were made solicitors to the company they ought to have disclosed the secret agreement to the directors. If such a course would have been inconsistent with their duty to their old clients, it was their own fault for accepting two inconsistent duties. A solicitor who has assisted in concocting a fraud upon a third party cannot escape the consequences of his complicity by afterwards becoming the solicitor of such third party. They were promoters of the company like the other Defendants, and were in a fiduciary relation to the company when it was established; and although we do not ask them to repay the money which they received for their services, we say that they ought to pay the costs of the suit: *Dunne* v. *English* (1); *New Sombrero Phosphate Company* v. *Erlanger* (2); *Phosphate Sewage Company* v. *Hartmont* (3); *Letexier* v. *Margravine of Anspach* (4); *Baker* v. *Loader* (5).

As to the third point, namely, the right of *Carlton* and *Grant* to their expenses and a fair commission, there were no expenses

(1) Law Rep. 18 Eq. 524.
(2) 5 Ch. D. 73.
(3) 5 Ch. D. 394.
(4) 15 Ves. 164.
(5) Law Rep. 16 Eq. 49.

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incurred by *Carlton*, because he was indemnified by *Grant*, and we deny that the expenses claimed by *Grant* were legitimately incurred. They principally consisted of advertisements and circulars puffing the company, and these were put forth for his own profit. Nor has he any equitable claim to a commission. A commission can only be based upon a contract, and there was none in this case. He undertook the task of floating the company entirely at his own risk. Nor is there any mode of assessing the amount of what would be a fair commission. It is true that we offered to allow him his expenses and a fair commistion in the bill; but that was to induce him to submit to our claim, and in ignorance of many of the facts of the case, but as he has set us at defiance, and as we have now ascertained that the transaction amounted to a fraud on the company, we have a right to withdraw our offer: *Knight* v. *Bowyer* (1).

The last point is the effect of the compromise with the vendors. The action was brought for a double purpose, to obtain a rescission of the contract as against the vendors if we should elect to do so, and also to recover from the promoters of the company the profit that they had fraudulently made by means of it. We had a right to give up our right to rescind the contract without prejudicing our claim against the promoters. The money paid by the vendors on the occasion of the compromise was the price paid by them to induce us to elect not to rescind the contract. It had nothing to do with the relief claimed against the other Defendants, who are not affected in any way by the compromise.

Sir *H. Jackson*, in reply for the Defendant *Grant*.

Swanston, in reply for the Defendant *Carlton*.

W. H. Duignan, in reply for himself and his partner.

Judgment, C. A. James, L.J.

August 8. JAMES, L.J.:—

Upon the main point in this case we did not think it necessary to call for any answer from the Respondents. These cases have

(1) 2 De G. & J. 421.

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been so often before the Court unfortunately of late years, and I have had occasion myself so often to express my views upon them, that I do not think it necessary to say any more upon this occasion upon the point than that I adhere to what was said in *Parker* v. *McKenna* (1), and to what was said in *New Sombrero Company* v. *Erlanger* (2). I adopt what was said by Lord *Selborne* in *Lindsay Petroleum Company* v. *Hurd* (3), and I think it unnecessary to say any more than that it appears to me according to what was said in those cases, and according to the established principles of the Court of Chancery, that the decree was a mere matter of course as against the principal Defendants.

However there are some minor points on which we heard the counsel for the Plaintiffs and had the matter fully discussed before us, and especially as to the Defendants *Carlton* and *Grant*, whether they were entitled to any deduction out of the amount which has been found against them and declared to be due from them by the decree of the Vice-Chancellor.

One point which was very strongly argued before us was that the Defendants *Carlton* and *Grant* were entitled to a deduction in respect of the sum which was received upon the compromise with the vendors, but I am of opinion that they are not entitled to any such deduction.

The case against the vendors was, in truth, a totally distinct and separate case from that against the other Defendants. The case against the vendors was that the Plaintiffs were by reason of what had taken place entitled to an absolute rescission of the contract, and the Plaintiffs and those Defendants, the vendors, agreed to put an end to that case in consideration of a sum of money paid by the vendors to them. That was the price of the company giving up that which beyond all question it seems to me they were entitled to, that is to say, the right to have the contract rescinded and to have the whole purchase-money repaid to them. With that price so paid for the compromise, it appears to me the other Defendants have really nothing to do. They are in no degree prejudiced by it. It was said, indeed, that if the case had gone to a hearing the Defendants might have offered themselves to have

(1) Law Rep. 10 Ch. 96. (2) 5 Ch. D. 73.
(3) Law Rep. 5 Ch. 221.

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taken the property and paid the whole of the purchase-money, and thus have put themselves in the position to realize the property. If they had that right at the hearing, and if they had been so minded, there was nothing in that compromise which would have prevented their obtaining whatever benefit such a course of proceeding might have given them. I am therefore of opinion that we cannot take into consideration at all that which was entirely a matter between the vendors and the company.

But there was a second point, which was with regard to the costs, charges, and expenses incurred by the Defendants, and also with regard to the allowance of a sum by way of commission. That divides itself into two branches, the costs, charges, and expenses, and the commission. Now the costs, charges, and expenses, I think they had a right, independently of the offer in the bill, to deduct, because what they were liable to pay the company was the profits which they had made in a fiduciary character, that is to say, the net profits which they had made, and I think that costs, charges, and expenses might properly be deducted in ascertaining the net profits, and to that extent, therefore, they were, I think, entitled, independently of the offer in the bill.

The commission stands entirely upon a different footing. The commission they clearly were not entitled to in any way whatever, except by reason of the offer which was made in the bill. The offer was reasonable and proper, and I may say a liberal offer on the part of the company, which they were minded to make, and notwithstanding the case of *Knight* v. *Bowyer* (1), before the Lords Justices *Knight Bruce* and *Turner*, to which we have been referred, we do not think this is a case in which it is reasonable that they should resile from the offer which they have so deliberately made. But that offer is one which of course is to be considered according to the true meaning of the company in making it, and we cannot deal with it as one which is to lead to further litigation, to further inquiry, to a new lawsuit between the company and the Defendants as to what would be reasonable compensation to be ascertained by a jury, or by the Court, or by the Judge in Chambers, or by a referee, but we must take the

(1) 2 De G. & J. 421.

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offer according to the true spirit of it, and it was an offer to pay what the Court thought to be a fair amount of commission, and we must deal with that in the best way we can. I shall mention before the end of what I have to say the mode in which we propose to deal with these two things respectively, the costs, charges, and expenses, and the commission.

Then there was the other point, which is the point in which the Defendants Messrs. *Duignan & Lewis* are interested as to the decree against them to pay the costs of the suit. Now, in considering what is right to be done with regard to that question, it is necessary, I think, to bear in mind this, that the case of the company is, in fact, a double case; it is a double suit which might have been made the subject of two totally different suits, if the Plaintiffs had been so minded. The one was against the vendors for rescission of the contract. To that suit the solicitor might, according to the practice of the Court, have been a proper—not a necessary, but a proper party—because he was an active or concurring party in the matters which gave the right to rescind. If that had been the sole suit, if he had been retained as a party merely for the purpose of rescission, probably the decree might have been right in making him pay the costs, though I am not prepared to extend or to encourage the practice of making a solicitor party to a suit when there are real parties before the Court to answer for what they have done.

But then there was the other part of the suit, and the other part of the suit was really, in my judgment, an action for money had and received to the use of the company. It was money received by persons—profits made by persons in a fiduciary character, of which profits they are trustees for the company. To that part of the suit the solicitor *quâ* solicitor was certainly not a necessary or proper party.

Now, with regard to the first part of the suit, that which relates to rescission, I am bound to say that I think charges have been made against Mr. *Duignan* considerably beyond what ought to have been made—considerably; but I think that Mr. *Duignan* was, to say the least of it, very indiscreet. I am not prepared to say much more than that I think he ought not to have been party to the preparation of the secret and ostensible agreements which

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might have been made the means of deception and fraud; he was arming some person with that which might have been made the means of fraud. Then he ought not, being the solicitor to the vendors, and having been a solicitor concurring in the transaction, such as it was, to have placed himself in the position of solicitor to the company, the purchasers, while the purchase was still incomplete, and while the company was still really not bound to anything until they had put their seals to the instrument by which they adopted the agreement made with Mr. *Carlton*. He was indiscreet in putting himself in that position of solicitor in which, perhaps, it was his duty—a conflicting duty—to communicate what he knew; therefore I cannot acquit him of impropriety and indiscretion in that respect.

But then we have to consider this, that the suit for rescission was entirely compromised. The suit for rescission was compromised with the vendors, and thereupon that part of the suit in which Messrs. *Duignan & Lewis* were made parties, *quâ* solicitor, was compromised with the principals and came to an end. Thereupon the suit ought to have been, as it appears to me, dismissed *simpliciter* without costs against each of those gentlemen—I mean in that character so far as they were parties to the first part. That was not done. The suit was continued after that compromise was made, after that which was mentioned in one of the letters of the company's solicitors themselves, after they had obtained the material object of the suit for which they had made them parties—after that they were still continued parties to the suit, and they were continued parties to the suit in respect of a personal demand as against them, to repay the sum of £1500 alleged to have been received by them out of the moneys of the company. That is a part of the suit which has entirely failed. The Vice-Chancellor was satisfied, and we are satisfied, that there never was any pretence for saying that that £1500 was money of the company which the company were entitled to regain from them; therefore the suit was proceeded with for the purpose of recovering from them something which they were not liable to pay, and which the company was not entitled to receive. Therefore I am of opinion, and my colleagues concur with me in this, that the reasonable and fair thing to do with respect to the costs of Messrs. *Duignan & Lewis*

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is that they are to have no costs up to the time at which the compromise was made with the vendors, but that from the time of that compromise up to and including the present appeals, they are entitled to have their costs of the suit.

That, I think, disposes of that part of the case, and then the mode in which we propose to deal with the question of the set-off or the demand for costs, charges, and expenses, and the commission, is to add to the decree these words—the exact words will be given to the Registrar, but this will be the substance of them—It appearing from the evidence that costs, charges, and expenses were incurred in and about the formation of the company (putting in the proper words there), to the amount of £6250 or thereabouts, declare that the Defendants *Grant* and *Carlton* may retain out of the sums ordered to be paid by them such sum, but at the request either of the Plaintiffs or the said last-named Defendants, let an inquiry be made in Chambers as to the actual amount of such costs, charges, and expenses, and let it be certified whether such actual amount is more or less than such sum, and the excess or deficiency, as the case may be, is to be paid by the company to such Defendants, or by such Defendants to the company; and the company having by their bill offered to pay a fair commission, this Court doth think fit by reason of such offer (that really is the only ground on which we do it) to assess such reasonable commission at £9000 to the Defendants *Grant*, *Carlton*, and *Richardson*. We say to *Grant*, *Carlton*, and *Richardson*, because they must receive that jointly, and they must apportion it between themselves. We have no means of doing that, or ascertaining how that sum is to be divided. They are all three persons who earned that commission, and they all three are entitled to it.

Judgment, C. A. James, L.J.

BAGGALLAY, L.J.:—

Baggallay, L.J.

I am of the same opinion, and I have very little to add. The cases to which the Lord Justice has referred establish no new principle; they recognise an old principle, but they apply it to new states of circumstances. It appears to me that, having regard to the principle so established and so recognised, it is impossible to deal with the facts of this case, as they are admitted even by the answers of the Defendants *Grant*, *Carlton*, and *Richardson*,

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without coming to the conclusion that those three gentlemen stood in a fiduciary relation to the intended company, and that as such they cannot make profit out of the transaction.

As regards the deductions to be made from the amount ordered to be paid by the decree of the Vice-Chancellor, I was for some time pressed with the notion that the amount received by the company upon the compromise with the vendors ought to be deducted from the amount so ordered to be paid by them, but a further consideration of the case has satisfied me that that is not so. If prior to the institution of this suit a dispute had arisen between the company and Messrs. *Bagnall* with reference to a suggested rescission of the contract, it would have been perfectly competent for Messrs. *Bagnall* and the company to have come to any arrangement they might think fit with the view of putting an end to any such litigation, and after any payment had been made by the Messrs. *Bagnall* to the company for the purpose of leading to such an arrangement, it would have been quite open to the company then to have proceeded against their agents, *Grant*, *Carlton*, and *Richardson*, for the purpose of recovering from them the amount of profit which they made out of the transaction. It does not appear to me that the circumstance that the two forms of relief were combined in the one suit, and that relief was asked in an alternative form, can make any difference.

Then as regards the commission and the expenses, I have nothing to add to what has already been said by the Lord Justice.

With regard to the position of the Defendants *Duignan & Co.*, I am bound to say that in my opinion there is no ground whatever for charging them with any *mala fides* in any part of the transaction. I think that in the matters to which the Lord Justice has referred there was an indiscretion, an indiscretion which at the present day they would not think of committing, but an indiscretion which at that time perhaps, in the not very generally recognised application of principles to existing circumstances, they did not appreciate to the same extent as they would now. I think also there is this further circumstance, that it was desired by all parties that they should do that which I think was an indiscreet thing, namely, become the solicitors of the company; those who managed the company evidently thought that it would be a

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very great advantage to the company that these gentlemen, who had the entire confidence of Mr. *Bagnall* and afterwards of his trustees, should be in the position of solicitors to the company; and this is borne out by the fact that, notwithstanding the discovery of all these transactions, the company have thought it right and for their interest to continue Messrs. *Duignan & Co.* as their solicitors, though they were prosecuting a hostile suit against them.

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COTTON, L.J.:—

Cotton, L.J.

I am of the same opinion, and as this is the first time a case of this sort has come before me, I should like to express my reasons for holding that on the main point the decree of the Vice-Chancellor was correct.

The Plaintiffs were a company formed, as stated in their memorandum, to carry into effect an agreement of the 6th of March, 1873. That agreement was an agreement made between *Bagnall* and others and *Bytheway*, *Bytheway* being described as a trustee for and on behalf of an intended joint stock company about to be formed, and by that agreement "the vendors agreed to sell to *Bytheway* on behalf of the company, and the said *G. Bytheway*, on behalf of the company, agreed to purchase, on the terms hereinafter mentioned, the goodwill and business of *John Bagnall & Sons*." The price mentioned in that agreement, to which *Bagnall's* trustees and *Bytheway* were the only parties, was £290,370, and that was the agreement referred to both in the memorandum and articles and in the prospectus. *Bytheway* himself, as has been said, was a mere name; that is to say, it is admitted that he was acting on behalf of *Carlton* and *Grant*, and, therefore, if he is under this agreement a trustee, *Carlton* and *Grant*, putting him forward simply to represent them, must stand in the same position in which *Bytheway* would have done under that agreement. Now that agreement was not the only one. On the same day an agreement of even date was made between *Carlton* of the one part, representing himself and *Grant* (that being shewn clearly by a contemporaneous agreement executed between them), and *Bagnall's* trustees, the vendors, of the other part, under which, out of the purchase-money payable by *Bytheway*, or by the company

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when formed, a sum of £85,000 was to be received by *Carlton*. Of that, £60,000 was ostensibly for commission and expenses for the purpose of forming the company, and for the risk which *Carlton* undertook by the guarantee which he gave, and £25,000 was openly and ostensibly on the face of this "secret agreement" (as it may be called)—a sum deducted from the purchase-money in consequence of the time of its completion having been delayed—to be paid to *Carlton* for his own benefit, and not for the benefit of those who were called in the correspondence the ultimate purchasers, as undoubtedly that £25,000 ought to have been deducted for their benefit. Now that sum of £25,000, if *Carlton* was a trustee, could not possibly be retained by him; for I take it to be one of the clearest principles of equity that a trustee cannot, by any possibility, at the expense of his *cestui que trust*, make in secret and without his full approval a profit in the transaction in which he is a trustee. The £60,000, if it had really been all exhausted in expenses, if that was a possibility, might stand in a different position; but as far as it was profit, and the Court proposes to allow out of that £60,000 the expenses incurred in forming the company, that would stand exactly in the same position as the £25,000.

The only question seems really to be whether or no *Carlton* and *Grant* are, in respect of this contract, to be considered as trustees for the company afterwards formed. If they are, I can hardly conceive that it is open to argument that they must not account for all profit secretly made by them in the transaction.

It is said that at this time there was no company, and that, therefore, they could not be trustees for a company which did not exist; but there is a fallacy in that. At the time there was no company, and if before *Carlton* and *Grant* had proposed to the public to form a company—I will not say to join them, because *Carlton* and *Grant* did not join the company—to take over this contract, they had been minded to say to *Bagnall*, We will not insist on our contract, they might have given up the contract; or if they, without having disclosed the matter to the public and asked them to form a company to take this contract, had said, We will keep it to ourselves, they might have done so. But matters did not stop as they were on the 6th of March, 1873,

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when the matter had not been brought before the public. *Grant* (and *Carlton* must be answerable for his acts) does issue a prospectus asking the public to form a company for the purpose of taking this contract of the 6th of March, 1873, and that company is, as appears by its memorandum, expressly formed for the purpose of taking this contract. Now, can either *Carlton* or *Grant*, by possibility, say that the company is not a *cestui que trust* under that agreement of the 6th of March? The agreement was entered into by *Bytheway*, described as a trustee for and on behalf of the intended company. He bought the business on behalf of the company, and when the company was formed, and *Bytheway*, or *Carlton* and *Grant* behind him, offer the contract which had been so entered into to the company so formed, it is impossible to say that the company was not the *cestui que trust*, and when the company was so formed, and the benefit of the contract offered to it, those who had by this contract secured the business could not, in my opinion, retain any secret profit out of the price payable under the contract. They became in this respect in the same position as if the company had existed at the time of the contract.

That being so, the principle of equity clearly applies. *Carlton* and *Grant* are trustees for the company. They cannot, by any possibility, secretly make to themselves a profit in the transaction in which they were trustees; and I put it in that way rather than say anything about promoters being in a fiduciary position; because, although I quite concur in that, it is open to this observation, that they are not trustees as regards all matters nor at all times, but when once persons, who have got a contract for a company intended to be formed, do put forward to the public an option to join in the company, and to take the purchase, then from the very time when the contract is entered into they make themselves trustees for the company, and are, as regards obtaining any secret profit to themselves, in the same position as if the company was existing at the time when the contract was entered into.

There is another principle which we may consider as involved in this case: How can a trustee possibly justify saying to his *cestui que trust*, I bought this property for you, I bought it for £300,000, when in fact there was a secret agreement for the benefit and profit of the trustee, that out of the £300,000 a sum of £85,000,

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or any other sum—it does not depend on the amount—should go into his pocket as a benefit and profit to himself? It was urged, why should not the vendor pay his agent? and there was a sum paid to these gentlemen for services to be rendered to the vendor. I said during the argument, and I repeat it, that a vendor may pay his agent—nobody doubts it—but supposing that agent occupies another position, namely, that of agent or trustee for the purchaser, can he, as against the purchaser, looking to his position of trustee or agent for him, retain that which, if he had not occupied that position, he might have received, and properly received, from the vendor? In my opinion, therefore, *Carlton* and *Grant* must be considered, when the company was formed by them for the very purpose of taking their contract, to be bound by the terms of the contract; they made it on behalf of and as trustees for the company, and they cannot retain for their own benefit any part of the price which the vendor was willing to give up in diminution of the ostensible price. Therefore, in my opinion, *Carlton* and *Grant* are properly made answerable, not for the entire £85,000, but for the £85,000 less those expenses which the secret agreement required them to undertake in order to entitle themselves to the £60,000.

I have said nothing about Mr. *John Richardson;* but he was only made answerable for the £10,000 received by him. I see no possible reason for excusing Mr. *C. F. Richardson* from payment of that sum. He was a partner with his father; the £10,000 went into the partnership assets, and they well knew the whole of the transaction, well knew of all these agreements, and they well knew that the sum of £10,000 was to be paid to them out of the secret profit which persons standing in the position of trustees for the company were going to put into their own pockets.

Now I think I need add nothing to what has been said by the Lord Justice as regards the charges and expenses. The principle on which I decide this case is, that the trustee cannot make for himself a secret profit; and the profit is the net balance of the £85,000, after deducting any charges and expenses properly incurred in the formation of the company.

The commission has also been dealt with. I certainly should not have given any commission to any of these parties except

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for the offer in the bill, because I take it that nothing is clearer than that if a trustee will enter into such a transaction as this he cannot claim as of right any commission or payment for those services which, under such circumstances, he is in fact rendering to the *cestuis que trust*.

I would just say a word as regards Messrs. *Duignan & Lewis*. I concur in the result which has been arrived at by my colleagues; and I concur also in the opinion expressed by Lord Justice *James* yesterday, that no member of the firm had any intention to misstate, or to be a party to the commission of a fraud. It is difficult to see how they could (after a letter, which I referred to in the course of the argument, pointing out that any deduction from the price in respect of the alteration in the time of completion ought to go to the ultimate purchasers) have concurred in such a prospectus. They did concur in it, because they did not alter it, they knew it was issued in that form, they knew what was there stated, and they knew it referred to them as solicitors. It is difficult to see how they could have concurred in such a prospectus, referring only to the ostensible and not to the secret agreement; but I think, as is probably very often the case, they did not look at the real nature of the transaction, but were blinded by some considerations with regard to legal questions as to whether or no that secret agreement was such a contract as under the 38th section of the Act of 1867, ought to have been disclosed on the prospectus. But as they had knowledge of the secret agreement, and knowledge that the prospectus referred only to the ostensible agreement, I quite agree in saying that they committed a great mistake in allowing themselves to become the solicitors of the company. Whether or no it was their duty on becoming solicitors of the company to disclose to the board in such a way that it might be on the minutes (because that is the only way in which it could be brought to the knowledge of the board) the fact of the secret agreement, I give no opinion; but possibly, for their justification, it may be said that having regard to the person who introduced the three directors, Mr. *Gem*, Mr. *Lloyd*, and Mr. *Barclay*, they might reasonably suppose that the whole transaction had been communicated to them; but still, knowing what they did, it was, in my opinion, rather incautious of them to

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undertake the duty of solicitors to the company, to undertake the duty imposed upon them by the prospectus of shewing the intending shareholders the ostensible agreement of the 6th of May, 1873, when there was, as they knew, behind that, an agreement which entirely altered the purchase-money which ought to have been paid by the company. But thinking they were wrong there, I quite agree that when there was a compromise of that part of the suit to which they were made parties as having joined with the vendors in transactions which entitled the Plaintiffs to rescission, that part of the suit being at an end, they ought to have been dismissed without costs *simpliciter*. But the Plaintiffs have gone on, they have gone on with the other litigation to seek to recover the £1500, on a statement that that was received out of the purchase-money. But now it is to be borne in mind that there had been before the bill an investigation by the committee; that that committee had made its report, and that that report stated correctly that Mr. *Duignan* alleged (and alleged correctly, as it turns out) that the £1500 was paid not out of the purchase-money, but by one of the parties beneficially interested in the estate. That has turned out to be correct, and if the company chose to go on on the supposition that they could shew that it was in fact paid out of the purchase-money, they did it entirely at their own risk, and however incautious Mr. *Duignan* and his firm may have been as regards other parts of the transaction, and in becoming the solictors to the company, if the company chose to go on seeking to recover that £1500, and seeking to falsify the statements made by Mr. *Duignan*, which were made before the investigation committee, they must do it at their own cost and risk, and Mr. *Duignan* is entitled, from the time mentioned by the Lord Justice, to his costs, on the ground that those who continue such a litigation, though with a solicitor, must do it under the ordinary risk of having to pay the costs. And, as was pointed out by Lord Justice *Baggallay*, Mr. *Duignan* and his firm had the strongest answer to these observations and attacks which have been made on him, in the fact that, after the institution of the suit and until a very recent period, they were continued as the solicitors of the company. That probably would of itself be sufficient to vindicate them from the charges which have been brought

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against them; but I think it right, after the case has been heard, to say that I regret that there had been an attack of such a personal character, I think not deserved, against Mr. *Duignan* and his firm, because such attacks and such observations must embitter litigation, and must add to the expense by inducing parties, in their justification, to go into matters entirely irrelevant to those questions which the Court has to decide. I entirely agree with the Lord Justice, that it is not desirable to introduce solicitors who have been acting as such in the matter into litigation merely for the purpose of charging them with costs, or for any other purpose; and in this case it is specially to be regretted that after the compromise of the suit for rescission Messrs. *Duignan* were still continued, in order that the company might seek to recover from them the £1500, on grounds which the investigation committee had told them could not be supported. I therefore agree in what has been said by the Lord Justice, that as regards costs, Mr. *Duignan's* firm should have their costs from the time of the compromise, including the costs of the appeal. There will be no costs of the other Appellants, because, in substance, the decree has been affirmed.

Davey stated that the Plaintiffs were willing, instead of the joint decree made by the Vice-Chancellor, to take a several decree against *Carlton* for £12,500, with interest at £4 per cent.; against *Richardson* for £7500 only, with interest at the same rate; and against *Grant* for £65,000, with interest at the same rate; and that they were willing to allow *Grant* the whole expenses, which would be £6250, and £9000 for commission, which would be deducted from the £65,000.

COTTON, L.J.:—

I may state that the sum of £6250 was arrived at as follows:—for advertising, £3185; for printing and postage, £1640; for incidental expenses, £1000; and for Mr. *Duignan's* costs, 500 guineas.

JAMES, L.J.:—

I think the company have acted very fairly in this matter, and have acted as honourable men in making the offer as to costs,

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charges, and expenses, and as to commission, and I am glad to keep them to their offer accordingly.

Solicitors for Plaintiffs: *Tucker & Lake*, agents for *Wragge, Evans, & Jesson, Birmingham.*

Solicitors for Defendants: *Ashurst, Morris, & Co.; J. Holmes; Duignan & Smiles; Pawle, Fearon, & Coldham; Robinson & Preston; E. Flux & Leadbitter.*

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M. R. *April* 11, 12, 19.

C. A. *June* 25, 26.

PLIMPTON *v.* SPILLER.

[1876 P. 69.]

Patent—Novelty—Prior Publication—Book in Public Library—Specification—Subsidiary Claim not novel.

In order to invalidate a patent by prior book-publication, it is not enough to shew that the invention was described in a published book, but it must also appear that it became known to a sufficient part of the public.

Where a specification contains separate claims of two inventions, of which the second is to be used only in connection with and as subsidiary to the first, want of novelty in the second claim does not invalidate the patent.

In 1865 a patent for improvement in the construction of skates was granted to the agent of the inventor, who was a resident in *America*, and to whom the patent was afterwards assigned. Two years previously an American book containing a brief description of the invention (but not sufficiently particular to enable persons to manufacture the skates), and five weeks previously an American book of illustrations containing a drawing of the invention, were sent to the library of the Patent Office in *London*. This book of illustrations was not entered in the book of donations or in the catalogue, but it was placed on a bookshelf in a room open to the public, and was seen there by a librarian before the Plaintiff's patent was taken out:—

Held (affirming the decision of the Master of the Rolls), that there was no prior publication of the patent in this country.

The patentee claimed, first, a mode of applying rollers and runners to the footstand of skates so that they might be cramped or turned so as to cause the skate to run in a curved line by the canting or tilting of the footstand; and secondly, the mode of securing the runners and making them reversible, as above described:—

Held, that, assuming that there was nothing novel in the mode of securing the runners to the footstand, yet that the want of novelty in the second claim did not invalidate the patent, because the second claim must be read as claiming a subsidiary invention to be used only in connection with the principal invention.

Statement.

THE action in this case was brought by *J. L. Plimpton*, the proprietor of *Newton's* patent for improvements in the construction

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of skates, against *A. F. Spiller* and *T. Cross*, to restrain them from infringing the patent.

Newton's patent was dated the 25th of August, 1865.

The claim was as follows:—

"First: Applying rollers or runners to the stock or footstand of a skate, as described, so that the said rollers or runners may be cramped or turned so as to cause the skate to run in a curved line either to the right or left by the turning, canting, or tilting laterally of the stock or footstand.

"Second: The mode of securing the runners and making them reversible, as above described."

The Defendants denied the novelty of the invention, relying on certain cases of alleged prior publication and user, which were stated in their notice of objections as follows:—

"Before the date of the said alleged letters patent the alleged invention had been published in *England* in the (American) *Commissioners of Patents Journal* of the 6th February, 1863, and in the *Scientific American* of the 24th January, 1863, and a drawing or sketch in a book entitled, 'Illustrations accompanying the Report of the Commissioners of Patents for the year 1863 on Arts and Manufactures. Vol. 2. Engraved for Government by *E. R. Jewitt & Co., Buffalo, N. Y.*,' which book was deposited in the Patent Office in the month of July, 1865.

"Before the date of the alleged patent the alleged invention had been publicly used by Mr. *Mappin* at *Birmingham*, and Mr. *Farrin* in *London*."

They also objected to the second claim in *Newton's* specification, as being too large and not novel; and they alleged that prior to the date of the letters patent the invention, so far as related to the second claim, had been in use by the public in *England* by bookbinders, and was familiar to mechanicians as a bookbinder's plough and a bookbinder's portable screw press, and had been published in *England* in *Tomlinson's Cyclopædia of Useful Arts.*

The skates complained of as infringing the Plaintiff's patent were the "*Spiller*," which differed from the "*Plimpton*" only in the use of a spiral spring instead of an indiarubber pad to restore the axis of the roller to equilibrium, and the "*Wilson*," in

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which a mechanical equivalent was substituted for the inclined axis of the "*Plimpton*" skate.

In February, 1875, the Plaintiff instituted a suit in Chancery against *H. Malcolmson* to restrain infringements of the same patent. The Defendants on that occasion made a similar objection, on the ground of prior publication by the introduction of the American books into this country. The suit was heard before the Master of the Rolls, who, after carefully considering the evidence of prior publication, overruled the objections and established the validity of the Plaintiff's patent (1).

The particulars of the invention and the evidence of prior publication are fully set forth in the report of that case.

The only new evidence as to prior publication of the invention, beyond the isolated instances alleged of its use in *Birmingham* and *London*, related to the copy of *Jewitt's Illustrations accompanying the Report of the Commissioners of Patents for the year* 1863.

It appeared from the evidence in *Plimpton* v. *Malcolmson* that this book was received by Mr. *Prosser*, a sub-librarian at the library of the Patent Office, on the 20th of July, 1865, and marked with his initials and the date when he received it; but that it was not entered in the book of donations, nor (so far as appeared and as was now affirmatively proved) in the catalogue, but was put into one of the private rooms, and remained there (so far as then was known) unnoticed till the year 1875. Under these circumstances the Master of the Rolls held that the existence of that book in the Patent Office Library did not amount to a publication.

In the present case the following further evidence as to this book was relied on by the Defendants:—

Mr. *Allison*, a sub-librarian in the Patent Office, stated that in or about the spring of 1867, while they were removing the books from the old library to the new library, he saw the volume of *Jewitt's* book alluded to in the bookshelf in the corridor leading into the public room, which corridor was open to the public. At that time there were two volumes of that publication on the shelf, namely, the volume for 1861 and the book in question, which was published in 1863.

(1) *Plimpton* v. *Malcolmson*, 3 Ch. D. 531.

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It also appeared that in the new library the book was placed in a room upstairs, where the other American books were kept, and not in the principal room, and that the attention of the officials was first called to it by Mr. *Spiller* in 1875. Evidence was also adduced of the prior user of the invention in *Birmingham* and *London*.

Statement.

On the 29th of November, 1876, the Master of the Rolls granted an interlocutory injunction restraining the Defendants from making or selling any skate like the *Wilson* skate; and the Court of Appeal affirmed the order (1).

The action came on for trial on the 11th of April, 1877.

Matthews, Q.C., *Waller*, Q.C., and *Lawson*, for the Plaintiff, contended that the *Wilson* and *Spiller* skates were infringements of the Plaintiff's patent; but that question was not fully gone into, his Lordship having already intimated his opinion thereon as regarded the *Wilson* skate on the hearing of a motion in *Thorn* v. *Worthing Skating Rink Company* (2).

Argument.

(1) 4 Ch. D. 286.

(2) 1876. M. R. Aug. 4.

THORN *v.* WORTHING SKATING RINK COMPANY.

THIS was a motion in an action by a licensee from *Plimpton & Plimpton* as Plaintiffs against the *Worthing Skating Rink Company*, to restrain the Defendant company from infringing the Plaintiffs' patent by using the *Wilson* skate.

Matthews, Q.C., *Aston*, Q.C., *Waller*, Q.C., and *W. N. Lawson*, in support of the motion.

Davey, Q.C., *North*, Q.C., *Goodeve*, and *Healey*, for the Defendant company.

JESSEL, M.R.:—

This case comes before me on a motion for an interlocutory injunction upon a patent which has been already established, and therefore there is no question of the validity of the patent on this occasion, and the only question I have to decide is, whether there is a case for an injunction. Now, what is the meaning of infringement?

I wish to take the law upon that subject from an address to the jury by the late Chief Justice *Tindal* in the case of *Walton* v. *Potter* (1 Webs. P. R. 586, 587): "Where a party has obtained a patent for a new invention or a discovery he has made by his own ingenuity, it is not in the power of any other person, simply by varying in form or in immaterial circumstances the nature or subject-matter of that discovery, to obtain either a patent for it himself or to use it without the leave of the patentee, because that would be, in effect and in substance, an invasion of the right." Then comes the passage which I think is most important. The Chief Justice is speaking to the jury: "And, therefore, what you have to look at upon the present occasion is, not simply whether in form or in circumstances, that may be more or less immaterial, that which has been done by the

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Argument.

Davey, Q.C., *Goodeve*, *Warmington*, and *Healey*, for the Defendants, contended that the further evidence in the case, in addition

Defendants varies from the specification of the Plaintiff's patent, but to see whether in reality, in substance, and in effect the Defendants have availed themselves of the Plaintiff's invention in order to make that fabric or to make that article which they have sold in the way of their trade; whether, in order to make that, they have availed themselves of the invention of the Plaintiff." That is, he treats it as substance.

Now, in the present instance I have, as usual, the evidence of experts on the one side and on the other, and, as usual, the experts do not agree in their opinion. There is no reason why they should. As I have often explained since I have had the honour of a seat on this Bench, the opinion of an expert may be honestly obtained, and it may be quite different from the opinion of another expert also honestly obtained. But the mode in which expert evidence is obtained is such as not to give the fair result of scientific opinion to the Court. A man may go, and does sometimes, to half-a-dozen experts. I have known it in cases of valuation within my own experience at the Bar. He takes their honest opinions, he finds three in his favour and three against him; he says to the three in his favour, Will you be kind enough to give evidence? and he pays the three against him their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of fifty. I was told in one case, where a person wanted a certain thing done, that they went to sixty-eight people before they found one. I was told that by the solicitor in the cause. That is an extreme case no doubt, but it may be done, and therefore I have always the greatest possible distrust of scientific evidence of this kind, not only because it is universally contradictory, and the mode of its selection makes it necessarily contradictory, but because I know of the way in which it is obtained. I am sorry to say the result is that the Court does not get that assistance from the experts which, if they were unbiassed and fairly chosen, it would have a right to expect.

Then it is said sometimes, Why does not the Court appoint an expert of its own?—a course which is sometimes taken by the Court. It is very difficult to do so in cases of this kind. First of all the Court has to find out an unbiassed expert. That is very difficult. The Court does not know how many of these experts have been consulted by the parties, either in the case of this particular patent or of a similar patent. It may turn out that a particular expert has been largely employed by the particular solicitor on the one side or the other in the case, and it is so extremely difficult to find out a really unbiassed expert and a man who has no preconceived opinion or prejudice, that I have hitherto abstained from exercising the power which, no doubt, the Court has of selecting an expert to give evidence before the Court. That being so, it throws the Court on its own limited resources, and they are always limited with respect to subject-matter of the patent, a matter which depends on a very great variety of circumstances; and although the Court does derive, no doubt, a great deal of knowledge from the evidence of experts, yet of course, as we all know, in a subject-matter with which a person is not familiar from long training serious mistakes may be made which will not be made

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to that adduced in *Plimpton* v. *Malcolmson* (1), established the case of prior publication; that there was also evidence of prior user; and

by persons who are so acquainted. Still the Court is not at liberty to retire from its proper functions of deciding the case, and it must decide it as well as it can under circumstances of difficulty which are always present to it.

Now, the real question I have to decide is whether the Defendants' skate is, in substance, an infringement of the Plaintiff's. First of all, the eye has something to do with it. When you come to compare the two things the conviction at once forces itself upon the mind, or at least it did on my mind, that the man who made *Wilson's* skate had seen *Plimpton's* skate, or a model of it. It turned out, singularly enough, at the end of the case, that I was informed as a fact that he had previously seen *Spiller's*, which I have already decided to be a mere imitation of *Plimpton's*. That turned out to be a fact proved in the case. That conviction had forced itself so strongly on my mind from the mere inspection of the two skates, that I expressed myself perhaps too strongly in saying that, even against the oath of the man who had invented the second skate, I did not believe it credible that he had not seen the first.

This is a very remarkable thing, because when you come to a question of substance, without going into mere detail and the fringe of the case, if they are so remarkably alike that you have to look for the differences, it becomes a very serious question whether it is not an infringement. I take it that is the first test. Is it so like the patented thing that your mind is not directed in the first instance to dissimilarity, but to similarity. In other words, have you to examine it very carefully to find any distinction or difference? If that is the real position of the matter, *primâ facie* it is an infringement, not necessarily so, because you may on examination find that what you had overlooked in the first instance was really so essential and important a part of the invention, that you ought to decide at once that it is not an infringement.

Then, having arrived at that conclusion on the inspection, the next thing is to see what really has been done. In one sense what has been done is undoubtedly a mechanical equivalent. Whether it is a mechanical equivalent in the sense in which that expression is used in patent law is of course the question I have to decide. There can be no doubt that a mechanic having the first skate given to him, and being asked to produce the same result by a mechanical equivalent, would have produced, amongst other things, the second skate, if he produced anything at all. No doubt in that sense it is a mechanical equivalent. If I took the first skate and gave it to an ingenious workman, and said, "I want to evade that patent, therefore make me a skate which will do all that skate does, but mind you must not have 'that diagonal axis,'" I have no doubt he would forthwith produce the other, or something very like it, because I can see at once that the same result can be produced in another way. I can imagine a combination of two axles which would produce the same result without the universal joint or guide,

(1) 3 Ch. D. 531.

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also that there was want of novelty as regarded the second part of the claim in *Newton's* patent.

JESSEL, M.R.:—

This case has been argued at considerable length—I do not say at inordinate length—and several points are raised, which I will mention in their order, some for the first time, and some which were raised in the case of *Plimpton* v. *Malcolmson* (1). But, inasmuch as I was the Judge who decided *Plimpton* v. *Malcolmson*, the counsel for the Defendants considering that it was not very probable that any observations they might make on points decided there, and as to which there was no variation in the evidence, would induce me to reverse my own decision, and as it is intended to take the case to the Court of Appeal, abstained from arguing further those points, they being left open to them on the hearing of the appeal. I think that was a wise course, and a fair course to adopt both to their clients and the public, and I see no reason whatever to change my opinion which I formed and expressed with reference to this patent in the report of *Plimpton* v. *Malcolmson*.

I will now consider the new points which are relied upon, and which were not discussed in *Plimpton* v. *Malcolmson*. The first issue is want of novelty, and as the Appeal Court will have my

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and I dare say there are several other ways of doing it besides, in which an ingenious mechanic could shape it. Indeed, I recollect that in the case of *Plimpton* v. *Malcolmson* (3 Ch. D. 531) a workman had discovered another way of obtaining the same result.

Then the question is, whether the claim made by the Plaintiff of his machine is in substance invaded or evaded by what the Defendant has done. In my opinion it is. I cannot put it in any other way than that. It is the opinion the Court arrives at by comparing the two things. Of course I am not giving a final judgment upon it, because I shall have hereafter to hear evidence and to have the benefit of the cross-examination of the witnesses, more especially the experts, but without finally deciding it, it does appear to me that in substance it is a mere invasion of the Plaintiffs' patent. It is a deliberate attempt of a man who has seen the Plaintiffs' patent to make in substance the same thing with a mere colourable change or variation, so that he shall not take something which can be conceived to be more or less a material part of the Plaintiffs' specification.

That being so, I think the Plaintiffs are entitled to the injunction they ask.

(1) 3 Ch. D. 531.

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judgment in *Plimpton* v. *Malcolmson* (1) before them, I shall avoid repeating what I have there said.

The want of novelty relied upon is, first of all, prior publication. The prior publication is attempted to be made out in two ways: first, prior publication in the sense of actual communication in this country, and sale and user before the date of Mr. *Plimpton's* patent in August, 1865; and, secondly, prior publication by the transmission to this country of copies of the *Scientific American* and the *Commissioners of Patents Journal*, and a copy of a book which is called "*Jewitt's* Book," which contained a drawing attached to Mr. *Plimpton's* American patent. As regards that book I gave a long judgment in *Plimpton* v. *Malcolmson* (2), but it is right to advert to it, because the evidence now adduced shews that one fact was not known—certainly it was not known to me at the time I gave that judgment—and it is said to have a material bearing upon the case.

The law I laid down as regards that in *Plimpton* v. *Malcolmson* I adhere to, namely, that the question is whether the book has been published in the sense in which I think it ought to be made known to amount to a prior publication so as to invalidate the patent. The evidence is singular, and probably unique. I do not suppose any such case ever happened before, and it arises from circumstances which I believe are very unlikely to occur again.

The American civil war interrupted the regular communication between the *United States* and this country, and, according to the practice of the two countries, each set of the Commissioners of Patents communicates to the other the patents taken out in the country, which for these purposes is a foreign country, that is to say, the British Commissioners send copies of their patents to the American Commissioners, and the American Commissioners send copies of their patents to the British Commissioners.

The American patents, like English patents, consist of two parts, text and drawings, and where there are drawings they are of course separate from the text. The custom of the American Commissioners was to send regularly over here copies of their specifications and drawings. That was interrupted by the civil

(1) 3 Ch. D. 531. (2) 3 Ch. D. 565.

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war, and they did not then reach this country. Of course the librarian at the Patent Office and the officials would have been glad to have obtained copies of the specifications and drawings in order that that information which is much sought after by patentees in this country might be afforded, that is, a knowledge of what is being done in *America* with reference to the same subject. It does appear that on the 20th of July, 1865, the book in question reached this country. Mr. *Jewitt* was the publisher for the American Commissioners, and he also published in a separate book copies of the principal drawings on rather a large scale. Having previously presented a former volume of his book to the Patent Office librarian, he sent a copy of that book, and I am quite satisfied that the book was in the Patent Office on the 20th of July, 1865.

Then the next question is, what became of that book. The history of that book, which, as far as I know and believe, was the solitary copy that reached this country before August, 1865, is this: By the same mail there came a parcel of American publications, of which this was by far the most important, and one which, if Mr. *Atkinson*, the librarian, had been aware of it, he would have considered of the greatest importance. No doubt he would have made an announcement of it, so that the frequenters of the library should know that a large volume containing American patents and drawings had arrived, the transmission having been so long interrupted. Mr. *Prosser*, having made his note in the book, ought to have taken it to Mr. *Atkinson's* room, but he has no recollection of what he did with it. It is a very large book, and one which, if put on the table, must have attracted Mr. *Atkinson's* attention. Then we have this fact, that he did make an entry in his donation book on that day of two other volumes that arrived by the same mail from *America*, which must have been in the same parcel, and there is no entry of this book. How to account for that is very difficult. My own theory is, that it dropped out of the parcel somehow, and never reached Mr. *Atkinson's* table at all. That he never saw it is clear; that he never opened it is certain; because if he had once opened it he would have seen its importance. He is a librarian of forty years' experience, and I may say from my own knowledge he is rather distinguished by over-love for

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his library than any other quality. My conjecture is that he never saw it at all.

Then there is this to be said, that in all his experience he does not know of a single instance of a book having been given to the library without being entered in the Donation Book. It is never seen any more there until one of the assistants in the library says he saw it just before the books were removed from the old library to the new library. I cannot say that it is proved to my satisfaction whether that was in the year 1866 or 1867. My impression is, if it were left upon this evidence alone, that I should prefer 1867: the library was then removed, but all the books were not taken at the same time. When this lot of books went, of course depends upon imperfect recollection. It does not however much matter whether it was in the year 1866 or 1867 for my purpose. My impression is that it was 1867. But it is then seen, not in the public room in the old library, for there was a public room in the old library as there is in the new, but in the corridor leading to the public room, to which corridor the public have access. The public walk through there, and they might if they thought fit, walk up one of the ladders and take a book down from the shelves. This book was emphatically on the shelf. It was not put in the Library Catalogue, that being the book to which visitors look, and being in two parts, one of which describes simply the books which are in the library; and if it is a periodical, such as the *Times* newspaper, they would call it "*The Times*," and leave it there. If you went to ascertain what the volume is composed of, then you look at another catalogue which gives you date and description of every volume of the periodical, if it is in volumes, and if Mr. *Atkinson* had known of it he would have put it in that catalogue as he had Mr. *Jewitt's* smaller book. But it never got there, and where the book was on the 25th of August, 1865, I have not the slightest idea. One may guess that it got into the corridor before 1865 if you like. I see no reason to guess why it should have got there before or afterwards. Having come to the conclusion that it was mislaid somehow and afterwards found by some one and put in the corridor, there is nothing to shew that it was in the corridor on the 25th of August, 1865. My impression is rather against it, but I give no positive opinion

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upon the matter. But supposing it got there, was it accessible to the public in the proper sense of the word? There are only two ways in which the public could find out whether that book was there, either by consulting the catalogue or by going to the librarian. Mr. *Atkinson* certainly did not know of it, and therefore it was of no use to ask him. It was not in the catalogue, therefore it was of no use consulting it, nor was there any use in consulting the Donation Book. How the public could find, except by accident, that the book was on the top shelf in the corridor it is impossible to say. Therefore, practically it would be laid on the shelf in the popular sense of the word. No one would know of its existence even if it got into the high shelf of the corridor; but practically I am satisfied that no one knew of it. The question does not arise as to whether, if it had been in the corridor, I ought to presume the public knew of it. That point does not now arise, but my own opinion is that that alone would not do. If I come to the conclusion, as I do, that no human being in this country, that neither the librarian nor assistant librarian nor anyone else had ever seen this plate on the 25th of August, 1865, and that there was no fair knowledge communicated to the public of the existence of this plate in this country in August, 1865 (on both of which points I have arrived at a positive conclusion), I hold there was no sufficient publication to invalidate the patent. I have already said that if there had been I should have arrived at the same conclusion.

[His Lordship then reviewed the evidence as to the alleged prior user of the roller skates in *Birmingham* and *London* in the spring of 1865, which he considered not to be established.]

Now I come to another point, which is a very material point, although it is a small one, and that is the want of novelty as regards the second claim in Mr. *Newton's* patent. I have remarked before in the case of *Hinks & Son* v. *Safety Lighting Company* (1), that it is the duty of the Judge to construe a specification fairly with a judicial anxiety to support a really useful invention if it can be supported upon a reasonable interpretation of the patent; or as Mr. *Aston* said, that a Judge is not to be astute to find flaws in small matters in a specification with a view to overthrow it.

(1) 4 Ch. D. 607.

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Any man acquainted with the patents of this country, and the patent law, knows perfectly well that it is very strict, hard, and techinical against inventors as it stands. The want of power to amend the specification of an invention in a trying point often prevents an excellent and useful thing, which has given the patentee the greatest trouble and anxiety and shews the exercise of remarkable powers of invention, from being secured to him, merely because some slip has been made, as it is too frequently the case.

There are few patents of complicated inventions even as regards the text and drawings where some mistake or other is not made. Accuracy, as we all know, is very difficult of attainment; and when the Judge sees that there is a real substantial invention of great merit, and the description is fairly made, so that a competent workman can make the invention, it is not his duty to endeavour to construe the patent so as to make it claim that which it is utterly absurd to suppose would be claimed, because it is so well-known as a matter of public notoriety, that nobody would think of claiming such a thing. I am going to read this claim with the knowledge that I possess (which I am entitled to do) from the evidence as to what is alleged on the part of the Defendants to be really claimed by it.

Now, it must be remembered that, according to the evidence, the use of a clamp or a vice to hold something, such vice or clamp being made to have its cheeks or holders approach nearer by the means of turning a screw, is an invention so old that no human being would think of claiming it. One of the witnesses said that you might see it in every blacksmith's shop, and another said you might see it in nearly every workshop. Therefore it is not probable that Mr. *Newton* intended to claim it. Consequently when we come to read the claim, I think it is fair to say that, if it can be read in two ways, one claiming something that has a merit of novelty, and the other claiming something which would shew the man to be ignorant of all the ordinary appliances used in every workshop in the world, it is the duty of the Judge to adopt the construction which makes the patent reasonable and sensible, rather than that construction which makes the patent utterly absurd.

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What Mr. *Plimpton* says is this: "When the invention is to be used on ice, runners are employed constructed and applied as follows." Then he describes the application of the substitute for the rollers. The roller is used when you are skating on an ordinary level surface; and the two pairs of runners, as described in the drawings, are used when you are skating on ice. Is the word "runners" to be taken for the slip or bit of iron between the clamps, or the contrivance by which the runner is secured or fastened first of all in the clamp, which then is fastened or secured to the footstock? Now, it is not contended that if the second claim includes the mode of affixing or applying the runner to the footstock, that is, if it includes the clamp and the mode of affixing the clamp, there is not sufficient novelty. If, on the other hand, it is to be restricted to simply the mode of fastening the little piece of iron or runner in the clamp, then it is said to be undistinguishable from the ordinary vice, and not to be novel.

Now, the words are these: "The mode of securing the runners and making them reversible as above described;" which am I to take? Am I to take the mode of securing the runners to be new, or to be that which is alleged by the Defendants, the putting of the bit of iron in the clamp, which is not only not new, but is known to every one who has been in a workshop. No doubt it is my duty, if there is nothing else in the matter, to adopt that which would make sense of the patent instead of that which would make it useless. I may also observe that the use of the word "simply" in the specification with reference to the mode in which the runner is secured in the clamp shows that that was not intended to be claimed. I am of opinion, therefore, that this objection as to novelty also fails.

Then the next point is the infringement. There are two skates that have been made in this case: as regards the skate of Mr. *Spiller*, it is so obviously an infringement that on inspection it requires time and care to ascertain the differences. The skate is substantially the same as Mr. *Plimpton's*. As regards Mr. *Wilson's* skate, it is to be regarded for the purposes of this action to be in issue. But it was admitted by Mr. *Edwards*, on cross-examination, that there was no substantial variation between the *Plimpton* and the *Spiller* skate and the *Wilson* skate. In the

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latter there was the substitution of guides for a second axle, but the purpose was the same, and the guides so substituted were stated to be a mere mechanical equivalent, that is to say, you obtain the same purpose by substituting guides for an axle, which is a mere mechanical movement. The second skate, therefore, is an infringement of the first patented invention, because it has everything against which we have most to guard. It was proved to have actually happened. They put the skate into the hands of a competent mechanic, and wanting to produce the same result, they make use of the well-known equivalent, and then they produce the skate. It is the exact thing which has been proved to have been done, which is prohibited by law. It is, therefore, an infringement.

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The result is, that I find on all the issues for the Plaintiff, and the same order will be made as in *Plimpton* v. *Malcolmson* (1).

From this decision the Defendants appealed. The appeal came on for hearing on the 25th of June.

C. A.

Davey, Q.C., *North*, Q.C. (*Goodeve* with them), for the Appellants:— Argument.

The claim, especially the second clause in it, which claims the invention of the mode of fixing the runners, is too large. The word "runners" means the metal blades fixed in the clamp, not the whole machinery substituted for the rollers. The mode of fixing metal blades between two sides of wood or metal was well known before, and is not a fit subject for a patent. The claim, if too wide on the face of it, cannot be confined by referring it to the description in the specification: *Harris* v. *Anderston Foundry Company* (2); *Hinks & Co.* v. *Safety Lighting Company* (3); *Clark* v. *Adie* (4); *Neilson* v. *Betts* (5).

In the second place, the deposit of the American book of illustrations in the library of the Patent Office in *London* was a prior publication of the patent. The evidence now before the Court differs from that which was before the Master of the Rolls in

(1) 3 Ch. D. 531.
(2) 1 App. Cas. 574.
(3) 4 Ch. D. 607.
(4) 2 App. Cas. 315.
(5) Law Rep. 5 H. L. 1.

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Plimpton v. *Malcolmson* (1). It now appears that in 1867 the book was seen in the bookshelf side by side with the previous volume of the same work in a corridor which was open to the public. This was a dedication to the public, and thereby the illustration in the book became an addition to the stock of public information; the fact that it was not catalogued made no difference. It is sufficient that it was so placed that the public might have access to it: *Stead* v. *Williams* (2); *Stead* v. *Anderson* (3); *Lang* v. *Gisborne* (4); *Heurteloup's* Patent (5).

Matthews, Q.C., *Aston*, Q.C., *Waller*, Q.C., and *Lawson*, for the Plaintiff, were not called on.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

Two objections have been taken to the validity of the patent and to the judgment of the Master of the Rolls in this case. The first is with reference to the construction of what is called the second claim, and if it were necessary to consider whether the Master of the Rolls' construction of that claim was right or wrong we should probably have desired to have heard further argument; because I am bound to say that my present notion, or rather my present impression, for that is all I am entitled to say, is, that the second claim simply uses the word "runner" as being the blade, and the blade as fastened in that particular way. But in my opinion that is wholly immaterial when we consider what the claim is and how it is to be construed with reference to the entire patent.

It is important to bear in mind that there is nothing in the Act or in the patent law which says anything about claims. A patentee gets a patent for his invention, and he is obliged to specify that invention in such a way as to shew to the public not only the mode of giving practical effect to that invention, but what the limits of the invention are for which his patent is taken out; and the real object of what is called a claim, which is now much more commonly put in than it used to be formerly, is not to

(1) 3 Ch. D. 531.
(2) 2 Webs. P. R. 126.
(3) 2 Webs. P. R. 147.
(4) 31 Beav. 133.
(5) 1 Webs. P. R. 553.

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claim anything which is not mentioned in the specification, but to disclaim something. A man who has invented something gives in detail the whole of the machine in his specification. In doing that he is of necessity very frequently obliged to give details of things which are perfectly known and in common use—he describes new combinations of old things to produce a new result, or something of that kind. Therefore, having described his invention, and the mode of carrying that invention into effect, by way of security, he says: "But take notice I do not claim the whole of that machine, I do not claim the whole of that *modus operandi*, but that which is new, and that which I claim is that which I am now about to state." That really is the legitimate object of a claim, and you must always construe a claim with reference to the whole context of a specification.

Now, we have to consider what is the effect of this part of the claim. He says, "I claim first," and so on—and then he says, "Secondly, the mode of securing the runners and making them reversible as above described." Now, I agree with the Master of the Rolls that it is too absurd for any one to suppose that a man was claiming in the year 1865 as a distinct and substantive invention the putting of a piece of metal between two pieces of wood, and tightening them so as to hold that piece of metal fixed. That is a thing which no doubt was done even before metal was used. I suppose the very first stone implements were fastened into wood in that way, and the wood tightened round them so as to hold them fast. Therefore, the fact of putting something into two holders and screwing them up tight is a thing perfectly well known, and it is utterly impossible to suppose that the patentee was claiming as an invention a mode of securing a thing between two holders in such a manner as that he could take it out when he wanted to change it. And we have this to bear in mind also, that the whole of the patent is for one particular object, which is thus described: "The invention relates to an improvement in attaching the rollers or runners to the stock or footstand of the skate, whereby the rollers or runners are made to turn or cant by the rocking of the stock or footstand so as to assume radii of a circle, and facilitate the turning of the skate on the ice or floor, and admit of the skater performing with ease gyrations or evolu-

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tions without taxing unduly the muscles of the foot or ankles." That is the invention, and the only thing which is protected by the patent, or that could be supposed to be protected by the patent, is that mode of turning or canting by the rocking of the stock or footstand so as to give greater ease to the skater in performing these evolutions. Well, in describing the machine for that purpose the patentee gives a very minute description of the mode in which he does it, and as a mode, and as a very convenient and advantageous mode, he says, "I not only make the runners in this way, but I make them in such a manner as that the 'runner,' that is to say the piece of metal can, if convenient, be taken out and turned, and used four times running, and I shall shew you how I do that." That is what he has done in the description of the thing, and then he claims the applying of it to rollers. Then, secondly, he claims "the mode of securing the runners and making them reversible as above described." According to my view, and according to the fair and legitimate construction of the claim, he says, "I claim that as part of and in connection with my runner-skates. In my runner-skates I have introduced a very convenient and useful thing—a mode of making these runners useful four times over."

It appears to me that in doing that he is claiming, not a distinct and substantive invention, but he is claiming it as one of the merits and advantages of the entire construction which he has before given, and he is not in any way pretending or claiming to enlarge his monopoly; because of course it was a novelty as far as *Plimpton's* skates are concerned, for *Plimpton's* skates were novel, and he is only applying an old thing to an entirely new thing. When the new thing ceases to be patented that old thing will cease to be patented too; so that there is no pretence really for saying that he is endeavouring to obtain under the colour of that second claim something other and beyond that which the invention itself purports to be, that is to say, an invention for making a rocking skate in the manner which he has described in the first part.

That being so, it seems to me to be wholly immaterial what the exact construction of those words is, because after all that second claim really comes to nothing more than is included in the

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description of the invention itself. I mean that part of the invention which describes the runners; and the words "the mode of securing the runners and making them reversible." It seems to me to be perfectly idle and superfluous to the claim in the first part. They neither add to nor diminish from the patent, nor the monopoly which the patentee is seeking to obtain against the public.

I am therefore of opinion that there is really nothing in that objection, an objection which has been found out no doubt by persons microscopically scanning the thing afterwards, and giving it a meaning which it was never intended to have so as to apply to skates in general, or to every case in which a piece of metal is held between two parallel holders.

Then that objection failing, as it appears to me it ought to fail, we come to consider the next point with regard to the publication. In this particular case it is not necessary, I think, that we should lay down anything other than has been laid down in the cases which have been referred to: *Stead* v. *Williams* (1), and *Stead* v. *Anderson* (2). It is not necessary for us to lay down any new canon or rule as to what constitutes or does not constitute publication—as to how far a book in a public library may or may not be a publication, but I agree with the conclusion that the Master of the Rolls has arrived at in this case, that as a matter of fact it is impossible to say that this American book ever was in the library in any sense in which it could be construed to be accessible to the public, or that portion of the public which consists of persons conversant with this particular subject, or to patentees who are desirous of taking out patents for new inventions, and therefore desirous of making themselves acquainted with the course of inventions generally. It appears to me that the evidence is too slight to warrant any inference whatever that between the 20th of July and the 25th of August, 1865, that book which was sent over from America to this country was ever in such a position as to be, practically speaking, accessible to any part of the public.

That being so, it is not necessary to go further; but I should, if it were necessary, desire much further time to consider whether, even if it were proved that the book, one copy of which had been

(1) 2 Webs. P. R. 126. (2) Webs. P. R. 147.

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sent over as a present from a gentleman in *America*, was on the shelf in the library between the 20th of July and the 25th of August, that would be a sufficient publication, and would be such an addition to the stock of common knowledge in this country as would have prevented a man from being the first and true inventor of this patent; such an addition to the stock of common knowledge as a man was not entitled (to use the language of one of the cases) to deprive the public of. In these circumstances I am of opinion that the Master of the Rolls' decision was right, and ought to be affirmed.

Baggallay, L.J. BAGGALLAY, L.J.:—

The argument which has been addressed to us on behalf of the Appellants has been based upon the circumstance that two claims are made by the specification, and as regards the first of those claims it has been contended that the patent cannot be upheld by reason of the prior publication of the invention, and as regards the second, by reason of want of novelty. I will adopt the course which has been adopted by the counsel for the Appellants and by the Lord Justice, and deal with the second of these points first. Now I agree with the view which has been expressed by the Lord Justice, that the word "runners" is used in the second clause of the claim in the sense of describing pieces of metal which can be released from the other portion of the machinery and inverted or changed about from one direction to the other. I think also that in this specification the word "runners" has been used in two senses. It has been used in the first place to describe the whole of that part of the machinery which is substituted for the roller when the skate is to be used upon ice, and in the second part to denote a part of the runner described in the first part, namely, that by which the running is effected. I think it is clear that in the earlier part the word "runner" is used by way of alternative to "rollers." It is not necessary to refer to the passages in the specification, but the words "rollers or runners" occur at least half a dozen times; particularly with reference to the description in the plates, and it will be seen that in several of these instances the word "runners" is applicable to the whole of that part of the machinery of which we had the model here before us yesterday:

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again, when the machinery has been clearly described with reference to the rollers, we find the word "runner" introduced in the following terms: "When the invention is to be used upon ice, runners are employed, constructed, and applied as follows." There, no doubt, the word "runner" is used to describe that which is substituted for the rollers described in the earlier part of the specification.

But when you come to the description of the various portions of what is called the "runner" in the previous part of the specification, you find a piece of metal, which is only a part of the machinery, indicated by the letter I and called the "runner," and it is stated to have a smooth surface and angular edges, and to be capable of being reversed.

On the whole, therefore, not having heard any argument from the Respondents in the contrary direction, I am of opinion, as at present advised, that the word "runner" is used in the second part of this claim to describe a portion only of that which is called a runner in the earlier part of the specification.

Now, in my opinion, as at present advised, the second claim is not included in the first. As I read it, the first claim is for applying rollers or runners to the stock, or footstand, of the skate as described, so as to produce the result "that the said rollers or runners may be cramped or turned so as to cause the skate to run in a curved line either to the right or left by the turning, canting, or tilting laterally of the stock or footstand." I think that there the reference is to what I may call the attachment of the runner to the stock or footstand by means of a peculiar hanger, a sort of lever action which is in the hanger.

But what I think is described by the second part of the claim is this. The particular mode of securing the runner or metal plate between two other metal plates, so as to make it reversible. Now, if I could read that as a mere general description of fastening a piece of metal between two other pieces of metal by a screw, of course it would be idle to suppose that that could be the subject-matter of a patent. But I think you must read the second claim with reference to what the inventor has described and claimed above, and then it is for the mode of securing the runners of the skates above described, and making them reversible.

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I do not understand it to be suggested that the application of four runners to a skate in such a mode as is suggested, and the placing them in such a way as that you can change them either fore and aft or up and down has ever been suggested before, and certainly it is clearly in respect of that subject-matter useful. The use is pointed out in the terms of the specification, and it appears to me upon this view of the case that it is impossible to hold that there is a want of novelty such as has been suggested on the part of the Appellants.

As regards the objection to the first claim of prior publication, I do not propose to express any opinion as to what might have been the case if there had been evidence that the volume of illustrations had been sent over to *England*, and had been placed in the library a sufficient time before the date of the letters patent, had been catalogued in the usual way and had been so placed in the library as to be accessible to the public using that library. That certainly would be evidence of prior publication, and I must say very strong evidence indeed. But we have not got any such case here. So far as I can draw any inference from the evidence before us, I am very much disposed to adopt the view suggested by the Master of the Rolls, that in some way or other after this volume of illustrations reached the hands of the officials of the Patent Office on the 20th of July it became misplaced and never found its way into the library, or even into the corridor leading to the library, until after the date of the letters patent. But whether that view of the case be correct or not, if this prior publication is relied upon, it must be proved, and it appears to me there is an entire want of evidence to support that part of this case.

Brett, L.J.

BRETT, L.J.:—

I think it is right to observe upon the nature of the objection to this suit, that it is brought to prevent the actual infringement of a real substantial invention, and it is not now denied that that invention is a valuable invention, and that substantially it has been infringed. But then, in order to defeat the Plaintiff, there is an ingenious suggestion that a minor and wholly inappreciable claim has been made of something which is not novel. The Plaintiff has not complained of anybody infringing that particular part of

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the claim, and nobody has actually infringed that particular part of the claim. It is, therefore, an objection which may be properly styled to be a lawyer's objection. It is not denied that if this claim be erroneous it may be disclaimed to-morrow. Therefore, the only object of this objection is to prevent the Plaintiff from obtaining that which in substance it is admitted he is entitled to claim, and under these circumstances I agree with the Master of the Rolls that the Court ought to be anything but astute to support such an objection.

At the same time I think it cannot be denied that if a really independent claim of something which is not new, however inadvertently or carelessly it be made, is in fact made on the face of the patent, the Court is bound to hold that the patent is therefore objectionable, and that therefore the Plaintiff cannot succeed.

If this second claim had been in a form which would have applied to the runner of any other skate than that which is patented here, I should have thought it would have been bad, and that therefore the whole patent would have been bad, and that this Plaintiff could never recover.

But I am of opinion, not looking at this objection too astutely, as I say, that this second claim is so stated as to be confined to the runners of the particular skate of the patentee in the same patent, and which skate is well patented—I say that I think it is so confined for the reasons which have been given by Lord Justice *James*. I think it, however, right to refer to the description of the invention, which clearly shews that it is an invention of the whole of the skate, and that this subsidiary manner of securing the runner and making it reversible is not at all contained in the description of the real invention; and when you come to read further the words of the claim itself, it is not the mode of securing the runners to skates and making them reversible which is claimed, but it is the mode of securing the runners "as above described." Reading that, and interpreting it in conjunction with the description of the invention, I read the mode of securing the runners to the skates and making the runners of these skates reversible as intended to apply to the runners which are "above described," and those are the runners of those skates and of no others.

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If that be so, let us consider what the result must be if a person have a license or a right by purchase to use the skate which is thus patented, and which is well patented. He has the same right either by license or purchase to use the runners, and having the license to use the skate, if he use the runners he is guilty of no infringement at all. No one, as a matter of fact, who uses this runner (upon the assumption that it is the runner of this skate), could use it without using the skate, and if he have a license to use the skate, or if he have a right to use the skate, he has the same license and the same right to use the runner. If he has no license or right to use the skate, by using the runner, which he cannot upon the assumption use without using the skate, he uses the skate and infringes the real patent. Therefore you cannot, from the fact of any one using this runner or selling it for the purpose of use, make him liable for anything unless he infringes the patent itself. If he has not a right to the patent he cannot use the runner without infringing the patent for the skate.

Under these circumstances, confining this claim to the runner of the patented skate, it is obvious that the claim, whatever it be for, with regard to this runner, does not in any way increase the monopoly of the good patent, and if you can say that the subsidiary claim in the patent cannot, under any circumstances, increase the monopoly of the patent itself which is well claimed in the patent, it seems to me that the subsidiary claim is unimportant, is futile, has no effect, and therefore does not raise any objection to the patent. If you can bring it within the category of a subsidiary claim in the patent, you bring it within the principle stated by Lord *Westbury* (1), and under these circumstances it is no objection to the patent. I therefore consider that this second claim is no objection to this patent, because it is a futile claim, and has no effect upon the monopoly.

With regard to the question of publication, I must say I entirely and absolutely agree with the proposition of law laid down by the Master of the Rolls. It seems to me that the real question to be decided by the Court with regard to this matter is whether the invention was before the patent in question known to

(1) *Neilson* v. *Betts*, Law Rep. 5 H. L. 21.

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the public in the sense that the Master of the Rolls has described, *i.e.*, not known to all the public, but known to a sufficient number, so that you may properly say it was known in *England*.

In order to prove or disprove that fundamental proposition, you may shew by way of evidence that there has been a prior invention, and that it has become as a fact, although it has never been written, known to the people in the trade. That is what Baron *Parke* says in *Stead* v. *Anderson* (1), that it has become generally known in the sense that it has become known to the people in the trade. That is only one form of evidence which may be given in proof of the fundamental proposition. Another mode of proving the fundamental proposition is to shew that a description of the invention has been published. But, then, to shew that, it is not sufficient merely to shew that it has been published in one sheet or book. As Baron *Parke* himself says, "Published means offered or dedicated to the public." He then goes on to say that the question with regard to that is, was the invention published or offered to the public to such an extent as that it was generally known among engineers or persons interested in the matter? The mere fact of its being dedicated, the mere fact of its being published, is not sufficient, it must be so far published as that you may fairly say it is known to a sufficient number of the public.

Therefore I cannot agree with Mr. *Davey* when he says that it is sufficient to shew that the thing has been printed in a book, and that that book has been so placed that it might have been known to the public. It must be not only printed in a book, but that book must be placed in such a position and so used that you may fairly infer or assume that the contents of the book have become known to a sufficient number of people. Therefore, when you prove that this book was put in the Patent Library, I care not into what part, I do not say that is no evidence of its having become known to the public, but I say that when you have other facts which shew that although it was put into the Patent Library the proper inference is that nobody ever did see it there or elsewhere, then, although it has been in one sense, if you please, published, or in one sense, if you please, intended to be dedicated to the public, all I can say is that the public have not been able to take advantage

(1) 2 Webs. P. R. 147, 148.

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of the dedication or the publication, and therefore you do not shew that it was known to the public.

The consequence is that I am of opinion the Master of the Rolls has drawn a proper inference—an inference which a jury would be entitled to draw—an inference which I myself draw, and which shews that the proposition which lay upon the Defendants was not proved, namely, that this invention was made known in *England* before the time of this patent.

Solicitors for Plaintiff: *Ward, Mills, Witham, & Lambert.*
Solicitors for Defendants: *Tidy, Herbert, & Tidy.*

C. A. 1876 M. R. *Aug.* 3. C. A. 1877 *March* 6, 9, 13, 23.

TRAVERS *v.* BLUNDELL.

[1876 T. 112.]

Will—Appointment—Mistake—Falsa Demonstratio—Enumeration of Closes of Estate—Omission of Two Closes.

A testator gave all that part of *Rigby's* estate purchased by him consisting of closes *A.*, *B.*, *C.*, *D.*, *E.*, and *F.*, with the timber and coal mines, to trustees in trust for his son *J. O.* for life, with remainder to the use of *J. O.'s* children as he should by deed or will appoint, and in default of appointment to the use of *J. O.'s* right heirs. *J. O.*, by his will, after reciting the devise in his father's will (but without enumerating the closes), appointed all that part of the property devised by his father's will and therein described as that part of *Rigby's* estate purchased by his said father consisting of *A.*, *C.*, *B.*, and *F.*, with the timber, but not including the mines, to his two sons *T.* and *J.*; and he appointed the mines under the land which he had appointed to *T.* and *J.* to his four other children. The two omitted closes, *D.* and *E.*, lay between the other four.

A special case having been filed to obtain the opinion of the Court whether the two closes *D.* and *E.* passed under the appointment to *T.* and *J.*:—

Held (affirming the decision of the Master of the Rolls), that the corpus of the estate devised by the father was sufficiently designated in the son's will, that the enumeration of the four closes instead of the six was a *falsa demonstratio* which might be rejected; and that the whole of the six closes passed under the appointment.

Statement.

SPECIAL CASE.

Thomas Oldham, by his will, dated the 23rd of May, 1832, gave and devised as follows:—

"I give and devise to *R. Evans*, *J. Forster*, and *E. Hemsley*,

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their heirs and assigns, all my freehold estate and property in the parish of *Pemberton*, near *Wigan*, in the county palatine of *Lancaster*, and all that part of *Rigby's* estate purchased by me situate as aforesaid consisting of *Limekiln Meadow*, *Fingerpost Meadow*, *Kitchen Pasture*, *Great Pasture Field*, *Billing's Meadow*, and *Middle Meadow*, with the timber growing thereon, together with all the coal and other mines and appurtenances thereto belonging, or being upon or under the same, and also the three freehold cottages left to me by my grandfather, situate and being in a place called '*Nook*,' or '*Lamberhead Green*,' in the parish of *Orrell*, near *Wigan* aforesaid, with their rights, members, and appurtenances, to have and to hold, &c., unto the said *R. Evans*, *J. Forster*, and *E. Hemsley*, to the uses and for the intents and purposes thereinafter declared." And the testator declared that the said hereditaments should be held to the use of the said trustees during the life of his son *James Oldham*, upon trust to permit his said son to receive the rents and profits during his life, with power to work the mines opened or unopened, and to make leases of the said mines, and after the decease of his said son *James Oldham*, to the use of all or every or such one or more exclusively of the others of the children of the said *James Oldham*, at such days or times, in such shares, and with such limitations over for the benefit of the other children, and upon such conditions and in such manner, as *James Oldham* should by deed or will executed as therein mentioned direct or appoint; and in default of and subject to such direction or appointment, to the use of the right heirs of *James Oldham* for ever.

The testator died in September, 1832. He had no other freehold lands in the parish of *Pemberton* except the six closes purchased from *Rigby*, and he had purchased no other land from *Rigby* except those six closes.

James Oldham made his will, dated the 10th of February, 1838, which contained the following clauses:—

"Whereas by the last will and testament of my father, *Thomas Oldham*, bearing date the 23rd of May, 1832, he devised to the trustees therein named, their heirs and assigns, all his freehold estate and property in the parish of *Pemberton*, near *Wigan*, in the county palatine of *Lancaster*, and all that part of *Rigby's*

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estate purchased by him, situate as aforesaid, together with the timber growing thereon and all coal or other mines and appurtenances thereunto belonging or being upon or under the same, and also the three cottages left to him by his grandfather, situate in a place called '*Nook*,' or '*Lamberhead Green*,' in the parish of *Orrell*, near *Wigan*, aforesaid, with their appurtenances, to the use of them the said trustees and their heirs, &c."

The will then recited the limitations in the will of *Thomas Oldham*, and the power of appointment, and proceeded as follows:—

"Now, pursuant to and by force and virtue and in execution of the power and authority to me by the hereinbefore recited will given as aforesaid, and of any other power or authority in anywise me enabling in this behalf, I do by my last will and testament in writing by me signed and published in the presence, &c., direct and appoint that all that part and parts of the property comprised in and devised by the hereinbefore recited will of my late father as is and are therein described as that part of *Rigby's* estate purchased by my said father, situate as aforesaid, consisting of *Limekiln Meadow*, *Kitchen Pasture*, *Fingerpost Meadow*, and *Middle Meadow*, with the timber growing thereon, but not including any coal or other mines and appurtenances relating to such mines belonging or being upon or under the same which are hereinafter otherwise appointed or devised; and also the three freehold cottages left to my said father by his grandfather, situate, lying, and being in a place called '*Nook*,' or '*Lamberhead Green*,' in the parish of *Orrell*, near *Wigan*, aforesaid, with their and any of their rights, members, and appurtenances, shall from and immediately after my decease go, remain, and be to the use and behoof of my sons *Thomas* and *James*, their heirs and assigns for ever, to be used and enjoyed by them equally share and share alike as tenants in common and not as joint-tenants, as and for their respective portions and shares thereof. And as to the coal and other mines and appurtenances thereto belonging or being upon or under the said lands so heretofore appointed and devised to and between my sons *Thomas* and *James* in manner aforesaid, I do hereby direct, limit, and appoint that from and immediately after my decease the same shall go, remain, and be to the use of all and every my other remaining children or child, that is to

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say, all my children except and exclusive of my sons *Thomas* and *James*, for whom I have hereinbefore made provision, who shall be living at my decease, or born in due time after, equally to be divided between them as tenants in common, if more than one, and the heirs and assigns of such children and child respectively." And the testator gave the residue of his real and personal estate to which he was entitled, or which he had power to appoint or devise, to his wife *Ann*, her heirs, executors, administrators, and assigns.

The testator, *James Oldham*, died on the 6th of May, 1838, leaving his said son, *Thomas Oldham*, his heir-at-law. Besides his two sons *Thomas* and *James*, the testator left six children.

The persons claiming under the six children contracted to sell the coal mines under the whole of the six closes at *Pemberton* to *Thomas B. H. Blundell*, but a question having arisen whether the two closes called *Great Pasture Field* and *Billing's Meadow*, and the coals under them, passed under the appointment, this special case was filed, to which the persons claiming under the six children other than *Thomas* and *James* were Plaintiffs, and the purchaser and the persons claiming under the heir-at-law of *James Oldham*, who were entitled to the closes in default of appointment, were Defendants. The question submitted for the opinion of the Court was, whether the appointment of coal and other mines which was made by the will or testamentary appointment of *James Oldham*, dated the 10th of February, 1838, to his children exclusive of *Thomas* and *James*, did or did not comprise the coal and other mines in and under the two closes, *Great Pasture Field* and *Billing's Meadow*.

The case was heard before the Master of the Rolls on the 3rd of August, 1876.

Bovill, Q.C., *Chitty*, Q.C., and *Chapman Barber*, for the Plaintiffs.

Joshua Williams, Q.C., *A. Brown*, and *J. B. Herbert*, for the Defendants.

JESSEL, M.R.:— Judgment, M.R.

The point I have to decide is simply this, whether the description

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contained in this will is a description of what the testator had to devise or of a part of it. First of all, we must recollect this: he recites the will of his father, and only recites there that he had "devised all his freehold estate and property in the parish of *Pemberton*, near *Wigan*, in the county palatine of *Lancaster*, and all that part of *Rigby's* estate purchased by him situate as aforesaid," which I am told, and I assume for the purpose of my decision, is the same estate; that is, that the testator's property in the parish of *Pemberton*, near *Wigan*, was that part of *Rigby's* estate purchased by him. I also assume that he had no other property as part of *Rigby's* estate except the six closes in question. A conveyance has been produced shewing that he bought them, and I assume he had no other, so that that whole property in the parish of *Pemberton*, near *Wigan*, and the whole of that part of *Rigby's* estate purchased by the testator, consisted of six closes.

It is then to be noticed that there are three freehold cottages, all subject to the same power, and the testator recites the power extending to the will, and then, pursuant to and by force of the power (which was a power enabling him to appoint among his children, and in default gave a contingent estate to the right heirs), he proceeds to appoint. Now, he is going to exercise that power, and *primâ facie* he is going to appoint the whole of the property. Why should he recite that property is subject to the power, if he is not going to appoint it? It is, therefore, most probable, as he recites that that is the property subject to the power, that he is going to appoint it. He than appoints "all that part and parts of the property comprised in and devised by the hereinbefore recited will of my late father as is and are therein described as"—what?—"that part of *Rigby's* estate purchased by my said father, situate as aforesaid, consisting of"—then he names the four meadows—"but not including any coal or other mines and appurtenances relating to such mines belonging or being upon or under the same which are hereinafter otherwise appointed or devised; and also the three freehold cottages to go to the use of his sons *Thomas* and *James*."

What is the meaning of that? Is it "that part of *Rigby's* estate purchased by my father, and then consisting of" so and so, as added by the testator, or is it described as that part of *Rigby's*

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estate consisting of so and so? When we turn to the will, if that is the test, we find it is not so described in the will, for in the will it is, "consisting of six closes." Therefore it does not refer to the will, nor does it refer to the recital in the will, for the recital in the will is only "that part of *Rigby's* estate," consequently the natural and proper meaning of the words is a gift of the part of *Rigby's* estate purchased by my father as aforesaid, the words "consisting of" being added by the testator. There the question is, which is the leading description? The gift is of that part purchased by the father, and the "consisting of" is not an accurate description of what it consists. Indeed the same remark would have been made if it had been a recital. It appears to me the leading description is, "that part of *Rigby's* estate purchased by the father." It is a question on which very little can be said, for, as I said before, it is rather the impression of the Judge on reading the words knowing the facts than anything else, the principle of law being to construe the words, having regard, as far as you can, to the whole of the facts.

C. A.

From this decision the Defendants appealed. The appeal came on to be heard on the 6th of March, 1877.

Argument.

Joshua Williams, Q.C., and *Davey*, Q.C. (*A. Brown* and *J. B. Herbert* with them), for the Appellants:—

We contend that the two closes which were omitted by *James Oldham* did not pass under the appointment, but went to the Appellants in default of appointment. The omission of those two closes cannot be regarded as a mere *falsa demonstratio* which may be neglected. In the first place, there is a subject, namely, the four closes specially mentioned, to which every part of the description is accurately applicable. In the second place, there is no designation of the whole corpus independently of the description. In either of those cases the Courts never regard a description as a mere *falsa demonstratio*, for the law will not unnecessarily presume an error: *Cunningham* v. *Butler* (1); *Hardwick* v. *Hardwick* (2); *Roe* v. *Vernon* (3); *Doe* v. *Earl of Jersey* (4). As to

(1) 3 Giff. 37.
(2) Law Rep. 16 Eq. 168.
(3) 5 East, 51.
(4) 1 B. & A. 550.

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the inconvenience which may arise from the division of the estate and the minerals under the various closes, the Court has no concern with that; it can only interpret the will according to the ordinary rules of construction.

Argument.

Bovill, Q.C., and *Chitty*, Q.C. (*Chapman Barber* with them), for the Plaintiffs:—

There is in the appointment a clear and sufficient description of the property independently of the enumeration of the closes. The appointment is of "all that part of the property devised by the will of my late father, as is therein described as that part of *Rigby's* estate purchased by my said father, situate as aforesaid." That is a sufficient designation of the estate, and then follows an enumeration of the closes, which is defective. It may therefore be rejected: *Webber* v. *Stanley* (1); *Stanley* v. *Stanley* (2); *West* v. *Lawday* (3). The testator recites the power with the description of the whole estate, and professes to exercise the power; it is very unlikely that he intended only to exercise it as to part. His evident intention was to give the whole surface to his two sons *Thomas* and *James*, and the minerals under the estate to his other children. The construction contended for by the Appellants would make a most inconvenient division of the estate.

Joshua Williams, in reply.

Judgment, C. A.

March 23. JAMES, L.J., delivered the judgment of the Court (*James*, *Mellish*, and *Baggallay*, L.JJ.) as follows:—

This appeal raises, under somewhat novel circumstances, a question as to the applicability of the maxim, *Falsa demonstratio non nocet cum de corpore constat.* The testator was, under his father's will, equitable tenant for life of, with a power of appointment over, a small estate in the parish of *Pemberton*, in *Lancashire*. The legal reversion in fee in default of appointment was given to the son's right heirs. It consisted of six closes of land, forming one compact whole, and of three cottages. The six closes

(1) 16 C. B. (N.S.) 698. (2) 2 J. & H. 491.
(3) 11 H. L. C. 375.

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had been purchased by the father, the three cottages were a small ancestral property. By the will in question the testator made the following appointment, the whole of which it is necessary to read. [His Lordship read the clause in *James Oldham's* will, set forth above, and continued:—]

Thomas was the eldest son and heir-at-law. Two closes, being a third of the whole, are left out in the enumeration. They lie in the very centre of the property, and completely separate two of the named closes from the other two. The Master of the Rolls was of opinion that the two omitted closes did, notwithstanding such omission, pass by the devise. Hence this appeal. The counsel for the Appellants contends that there is no room in this will for saying that there is any *falsa demonstratio* at all, and that the whole constitutes one entire description of the subject-matter of the devise, every part of which is true, and can be predicated of the four closes, and the four closes only. He says the appointment is an appointment of land which had been purchased by the testator's father, and had been devised by his will—which is strictly true as to the four closes—and which did consist of the four named closes—which is true only of such four. But that is not the form of the appointment. The appointment is of that which had been devised by and described in the father's will by a particular description. And the question is, what is the thing so devised by and described in the father's will? *Primâ facie*, the whole description, including the enumeration of the particular closes, would appear to have been intended to be a transcript of the father's will. But the enumeration of closes in the son's will does not accord with the enumeration of closes in the father's will. There is nothing in the father's will described as "consisting of four closes." The contention of the Appellants, in fact, is that the son enumerated the four closes only for the purpose of restricting the gift to them—and that enumeration and description are the son's, and not the father's. And the father could not by prophecy have in his will described a subdivision of the property which did not exist in fact or in contemplation until it was made, if made, by his son's will. It is therefore contended by the Respondents that the reference to the father's will in the son's devise must stop where the quotation stops, that the corpus devised is "that part of

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Rigby's estate which had been purchased by the father and devised by and described in his will," and that the enumeration by the son's will is the son's description, inaccurate and insufficient, of the particulars of which that corpus consisted, and that it comes strictly and literally within the rule, *Falsa descriptio non nocet cum de corpore constat.*

In considering whether this is or is not a legitimate construction, it will be convenient to look at the father's will. The father's will devises it as follows:—[His Lordship read the devise in the will of *Thomas Oldham*, set forth above, and continued:—]

It is admitted that the part of *Rigby's* estate purchased by the father is exactly identical with the six closes. The words, therefore, in the father's will beginning with "consists of" are a merely additional and superfluous description of that which had been fully and sufficiently described and devised as "all that part of *Rigby's* estate which I purchased." In the father's contemplation *Rigby's* estate consisted of two parts, the part which he had purchased and the part he had not purchased; and the whole enumeration of the closes might be struck out of that will without in the slightest degree affecting the devise. In the father's will, then, we have a corpus well and sufficiently designated, followed by a description which in that case happens to be accurate and full.

Then the son's will begins with a recital of the father's will, and in that recital the first description and designation only are given. Therefore we have an entire property distinguished and known by the father as "all that part, &c." We have the same entire property known to and distinguished by the son "as all that part, &c." And then we have in the operative part of the son's will an appointment of that which had been described and devised by that designation. In the father's will we have a gift of a thing followed by a *vera descriptio*, in the son's will we have a gift of the same thing followed by a *falsa descriptio*. In the father's will, and in the first mention of it in the son's will, it is true we have the words "all that"; in the operative part of the son's will, it is "that" without the whole. But the omission of the "all" is immaterial. The son says it is described as "that part": it is described as "all that part," which is the same thing. That being so, we really have the very case of a gift of

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an entire thing followed by an insufficient enumeration of the particulars of which that entirety consists, a *falsa descriptio quæ non nocet.*

It is suggested that it is not to be imputed to the testator that he made a blundering omission of the two closes. But the very existence of the rule is based on the fact that people or people's scribes do constantly blunder in their description and enumeration of the particulars of their property.

It may be, however, that the context and surrounding circumstances would shew that what happens to be a blundering enumeration of particulars was a designed limitation of the gift itself. But how do the facts stand as to that? No doubt the omission of two out of six parcels, a third of the whole, is not easily accounted for except as a slip in copying, and the hypothesis of a slip in copying is rather excluded by the fact that the order of the four parcels in the son's will is not the same as the order of the same four in the father's will. On the other hand, it is in the highest degree improbable that the testator should have intended to die without making an appointment of the two centre closes in his property, splitting up the small estate in the most inconvenient way conceivable—that he should have appointed the four closes to his two eldest sons "as and for their share" in his property while he was leaving the two middle closes to descend to the eldest in addition. It is said, indeed, that he might have thought that the two omitted closes would pass under the residuary devise to his widow. But that he really intended that the two closes should so pass is an extravagant supposition. And there is the crowning absurdity—absolutely incredible—that, leaving the minerals as a provision for the younger children, he should divide such minerals into three distinct portions, the centre portion cutting off all communication with the other two, and so rendering the whole practically unworkable or nearly so. If the Appellants' contentions were right, we should have this small property thus divided: Two closes belonging to the two eldest sons as tenants in common, with the minerals belonging to the younger children; then two closes with the minerals belonging to the eldest son alone; then two other closes belonging to the two eldest, and the minerals belonging to the younger children. These considerations of course would

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not have availed if, on the plain construction of the words of the will, the gift expressed was only of the four closes. But they do add overpowering weight to the other reasons for deducing from the words the other construction.

In our judgment the decree of the Master of the Rolls must be affirmed, and the appeal dismissed with costs.

His Lordship added that the two cases of *Cambridge* v. *Rous* (1) and *Enohin* v. *Wylie* (2) appeared to shew the limits of the two classes of cases. In *Cambridge* v. *Rous* the words were, "I give and bequeath all the rest and residue of my property and effects, whether in money or in the public funds or other securities of any sort or kind whatsoever, to be divided equally," and there it was held a common residuary bequest, with a defective enumeration of particulars.

In *Enohin* v. *Wylie* the words are, "The money proceeds of all the above" (meaning the sale of certain real estates), "as also the whole of my capital which shall remain with me after my death in ready money and in bank billets belonging to me, shall be divided in ten equal parts." And there it was held not to be a general residuary bequest.

Solicitors for Plaintiffs: *Merediths, Roberts, & Mills.*

Solicitors for Defendants: *Gregory, Rowcliffes, & Co.*, agents for *Taylor & Rowbottom, Wigan.*

(1) 8 Ves. 12. (2) 10 H. L. C. 1.

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In re MARIA ANNA AND STEINBANK COAL AND COKE COMPANY.

C. A.
1877
V.-C. M.
April 14, 21.
C. A.
July 11.

McKEWAN'S CASE.

Limited Company—Agreement in Articles that Shareholders shall contribute to certain Debts—Insolvent Shareholders—Interest.

A company was formed under the Act of 1856, with a capital of £160,000 divided into £10 shares, and the memorandum stated that the liability of the shareholders was limited. The articles provided that certain debts of specified amount which had been incurred by six of the shareholders in forming the company should be paid by the company, and that if the company should not have sufficient funds to pay them, each shareholder for the time being should contribute and pay to the company a proportionate amount of those debts according to the number of shares of each shareholder. The shares were not all allotted. The company having been ordered to be wound up:—

Held, by *Malins*, V.C.—1. That the agreement to contribute to these debts was legal, and could be enforced by a call, though the shares had been fully paid up. 2. That each shareholder must contribute a sum bearing to the whole of the debts the same proportion as the number of his shares bore to the whole number actually allotted. 3. That if any of the shareholders were insolvent, the solvent shareholders must contribute *pro ratâ* the amounts which the insolvent shareholders failed to pay. 4. That the six shareholders were not entitled to interest upon large sums which they had paid for interest on the debts.

Held, on appeal, that the decision of the Vice-Chancellor as to points 1, 2, and 4, ought to be affirmed; but that no shareholder was liable to pay any further proportion in consequence of the inability of any other shareholder to pay his proportion.

Statement.

THE *Maria Anna and Steinbank Coal and Coke Company* was formed under the *Companies Act*, 1856. The memorandum stated that the capital was £160,000, divided into 16,000 shares of £10 each, and that "the liability of the shareholders is limited."

By the articles the company adopted two debts of £20,000 and £10,000 therein stated to have been incurred in purchasing part of the property on which the company was to carry on business, and for which six members of the company had given joint and several promissory notes. The 5th article was as follows:—

"If the parties who have signed the above-mentioned notes for the said sums of £20,000 and £10,000, or any of them, or the

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said company, shall be called upon to pay the same principal sums or either of them, or the interest for the same respectively, and the said company shall not have in hand funds of the said company applicable to the payment thereof of sufficient amount, then and in such case each and every shareholder in the company for the time being shall contribute and pay to the company as a debt due to the company a proportionate amount of the sum or sums which the company shall be so called upon to pay according to the number of shares held by each shareholder."

On the 23rd of July, 1873, an order was made for winding up the company, and it was found that the assets of the company, after all the shares taken had been fully paid up, were not sufficient to discharge the £20,000 and £10,000 as well as the other debts. On the 21st of November, 1874, Vice-Chancellor *Malins* decided that a holder of fully paid-up shares was liable to be placed on the list of contributories by reason of his liability to contribute towards payment of the above two debts. *Maxwell's Case* (1), where some further clauses of the articles will be found.

Of the 16,000 shares in the company only 12,706 had been issued. *McKewan* was a holder of 258 shares fully paid up, and in January, 1875, he was settled on the list of contributories.

Advertisements were issued for claimants in respect of the debts of £20,000 and £10,000, and claims were carried in and allowed to the following amounts—£15,000 principal, and £12,929 1*s.* 10*d.* paid for interest on the £15,000 by the persons who had signed the promissory notes. The same persons also carried in a claim to the amount of £4744 19*s.* 9*d.* for interest upon the sums so paid by them for interest. On the 16th of December, 1876, an order was made in Chambers allowing this last claim, and on the 29th of January, 1877, an order was made for a call calculated on the above footing.

McKewan moved before Vice-Chancellor *Malins*, on the 14th of April, 1877, that his name might be removed from the list of contributories, or that in the alternative the order of the 16th of December, 1876, might be discharged and the order for a call

(1) Law Rep. 20 Eq. 585.

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varied. Several other shareholders similarly circumstanced gave similar notices of motion.

J. Pearson, Q.C., and *Burton Buckley*, for *McKewan*:—

It has been decided in *Maxwell's Case* (1) that the holders of fully paid-up shares are liable to contribute to the payment of the debt of £30,000, but it is submitted that such liability is limited to the amount of each share, and that *McKewan*, who is the holder of 258, can only be called upon to pay £10 per share; but if his liability extends to any further sum which may be required beyond the £10, then it must be limited to such proportion as his 258 bears to the whole number of shares issued, which was 12,706. At all events, he cannot be called upon to pay more than his relative proportion in consequence of some of the shareholders being unable to pay their quota of the amount. The proportion is expressly limited by the 5th article of association to the number of shares held by each shareholder. They also cited *Sewell's Case* (2) and *In re Stuart's Trusts* (3).

Robinson, Q.C., and *Northmore Lawrence*, for other shareholders in the same interest.

Cotton, Q.C., and *North*, for the official liquidator:—

The shareholders in this company have contracted by their articles of association to indemnify the directors, who guaranteed the repayment of the money advanced for the benefit of the company. The case is, therefore, precisely the same as if it had been a company with liability limited to the extent of £30,000 beyond the amount of the shares. The rule of law in such cases is that those shareholders who can pay must contribute the money which cannot be obtained from insolvent shareholders, and the limitation provided by the articles is, to the amount of shares held by each individual; consequently the solvent shareholders must pay for those who are insolvent in the proportion of the shares held by each. The law is settled by the cases of *In re Professional Life Assurance Company* (4), *McInroy* v. *Hargrove* (5),

(1) Law Rep. 20 Eq. 585.
(2) Ibid. 287.
(3) 4 Ch. D. 213.
(4) Law Rep. 3 Eq. 688; Ibid. 3 Ch. 167.
(5) 16 L. T. (N.S.) 509.

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Robinson's Executors' Case (1), and the cases cited in *Lindley* on Partnership (2).

J. Pearson, in reply.

Judgment, V.-C. M.

MALINS, V.C.:—

I have had this company before me on several occasions, particularly in *Maxwell's Case* (3), where I decided that, though the memorandum of association limited the extent of liability as regarded creditors outside the company, there was nothing in the Act of 1856 preventing the shareholders from contracting *inter se* to make themselves liable to a greater amount; that the provision in the articles of association constituted such a contract; and consequently that holders of fully paid-up shares might be put on the list of contributories for the purpose of having a call made to meet the liability so incurred. This is the first case, as far as I recollect, where a limited company have by their articles rendered themselves liable to pay a larger sum than the nominal amount of their shares. My decision in *Maxwell's Case* has not been appealed, and is therefore acquiesced in, namely, that there was here, over and above the liability of £10 per share to the outer world, a liability of the shareholders *inter se* to pay this debt of £30,000, or so much of it as the general assets of the company, including all calls to the amount of £10 a share, should be insufficient to pay.

The question I am now called upon to decide is to what extent the shareholders are liable. Mr. *Pearson*, on behalf of *McKewan*, contends that if there is a liability—and he does not deny a liability to a certain extent—he is only liable to the debt in the proportion of 258 shares, which is the number held by him, to 12,706, which is the total number of shares issued. This would make the liability amount to about 25*s.* a share; but if he is to be answerable for those shareholders who cannot pay, then the money to be called up would amount to £3 per share. Now that this debt is a debt of the company, is put beyond doubt by the clauses in the articles of association. The real question turns

(1) 6 D. M. & G. 572. (2) 3rd Ed. p. 790.
(3) Law Rep. 20 Eq. 585.

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upon the 5th clause of the articles, which provides that if the company shall be called upon to pay the amount, and shall not have in their hands sufficient funds for the purpose, then every shareholder in the company for the time being shall contribute and pay to the company, as a debt due to the company, a proportionate amount of the sum or sums which the company shall be so called upon to pay, according to the number of shares held by each shareholder. This, therefore, is a company debt, and there is a contract to pay it; but it is argued that no one can be called upon to pay more than an equal quota of the amount. That, however, is not the law. The law is that where there is a contract by shareholders to pay in proportion to their shares, they must pay whatever the other persons associated with them cannot pay, until the whole amount which the shareholders are liable to pay is exhausted.

That was decided in the case of the *Professional Life Assurance Company* (1). That was a case of an unlimited company, in which every shareholder contracted as between himself and the other shareholders that he should be liable for the debts of the company in proportion to his share and interest for the time being in the funds of the company, and that the directors should pay any debt due from the company to a shareholder in the same manner as if such shareholder were an ordinary creditor of the company. When the company was wound up calls were made to the full amount of the unpaid capital, but the proceeds were insufficient to pay the debts of the company, and it was held that creditors who were also shareholders were entitled to have their debts paid in full by means of a further call on the shareholders, and that if any of the shareholders were unable to pay the call, the deficiency must be made up by the other shareholders. The result, therefore, is that in all cases of unlimited companies there must be a call upon all the shareholders, and if they cannot all pay, and that enough is not produced by means of the contributions of those who can pay, you must go on and make another call upon those who can pay, and so on until the whole is paid, and ultimately, if there is only one solvent shareholder, he may have to pay the whole remaining debt. I had such a case before me

(1) Law Rep. 3 Eq. 688.

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McKEWAN'S CASE.

Judgment, V.-C. M.

in the winding-up of the *South Essex Estuary Company*, where all the funds were exhausted, and ultimately the last shareholder who could pay had to pay the whole remaining debts of the company. The same thing happened in the winding-up of the *Overend & Gurney Company*. There I went through the same process, and when those shareholders who could not pay had been exhausted, then the last who had money was obliged to pay the whole. Therefore, where a company is unlimited, those who can pay must pay for those who cannot. The rule is universal that where persons associated together contract to pay debts in proportion to the shares held by them, so long as the debts remain unpaid every shareholder must contribute his due proportion, and make up the deficiency for those who cannot pay, and all the debts of the company must be paid while there is one shareholder to be found who is capable of paying.

Those being the general principles, what is there to take this case out of the general rule? I have already decided in *Maxwell's Case* (1) that the holders of fully paid-up shares might be put on the list of contributories for the purpose of having a call made to meet this debt, and *McKewan* is bound by my decision in that case so long as it stands unrepealed. That was a representative case, and *McKewan* was a shareholder at the time. Therefore that case is a decision against him. He is a contributory of the company, and is liable to pay the sum borrowed, which was the only means by which the company could be carried on.

That decision in *Maxwell's Case* is applicable to any private partnership or any public partnership, limited or unlimited, where the parties have bound themselves by such a contract as this.

The case of *McInroy* v. *Hargrove* (2) is a strong illustration of this principle. There five persons had joined together to purchase a large quantity of sugar, and it was to be at the risk of all five in the proportion of one-fifth each. In that case it was contended that there was only a liability as to one-fifth, and that two having failed to pay, the other three were only liable for so much as would have been their quota if all five had paid equally, but it was decided on appeal by Lords Justices *Cairns* and *Turner* that the solvent partners were bound to bear the loss in equal proportions.

(1) Law Rep. 20 Eq. 585. (2) 16 L. T. (N.S.) 509.

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Now the arguments to-day go to this, that not one of these shareholders can be made to pay more than a proportionate sum per share if that sum would produce the amount of the debt, supposing all the shareholders could pay up the whole of their shares, and consequently that *McKewan* can only be made liable for a specific sum as his share of the liability upon his 258 shares. But why is he to be protected from payment of the whole sum when he has contracted to be liable for the full payment? The object of the transaction is that, as five or six of the shareholders had contracted a liability to pay a large amount, not for their own interest only, but for the common benefit of the company they were to be secured against loss if the project was unsuccessful, while if successful they would have a benefit jointly with the other shareholders. They were to be indemnified out of the £10 per share if the scheme had turned out successful, but upon what principle is it that they are not to be indemnified in case some of the shareholders are not able to pay their quota of the liability? There are no circumstances that apply to an unlimited which would not equally apply to a limited company. I read it, therefore, as a contract by every shareholder that he will contribute in proportion to the number of his shares in case all the shareholders are able to pay their proportion, but that the clause was never intended to limit the liability except as to the proportion in which each shareholder was to pay, that is, not according to the relative proportion of the shares held by him to the whole number of shares, but according to the proportion of shares held by him relative to the number of shares held by those who are able to pay; so, if there are holders of 5000 shares who can pay, *McKewan* will still only contribute with them in the proportion of 258 to 5000. Therefore the words in Art. 5 are not ineffectual because his liability will always be limited to the number of his shares. Those who can pay must contribute in proportion to their shares any sum which cannot be obtained from those who are unable to pay. Upon these grounds, my opinion clearly is, that the words "according to the number of shares held by each shareholder" have no more effect in limiting the amount of liability than the words "in the proportion of one-fifth" in *McInroy* v. *Hargrove* (1),

(1) 16 L. T. (N.S.) 509.

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or the words "in proportion to his share and interest in the property of the company" in *In re Professional Life Assurance Company* (1) had the effect of limiting the liability in those cases.

My decision, therefore, is, that *McKewan* and those who are in his situation will be liable, so long as any portion of the debt remains unpaid, to contribute with those who are able to pay in proportion to the number of shares they held—not in the proportion of 258 to 12,706, but in the proportion of 258 to the number of shares held by those who for the time being are able to pay, and that *McKewan*, and those in the same position, must go on with their contributions until, by means of calls from time to time, the whole debt is paid.

April 21. The case was now brought on again upon the question as to the £4744 19*s.* 9*d.* for interest upon interest.

Argument.

J. Pearson, Q.C., and *Burton Buckley*, for *McKewan*:—

The makers of the promissory notes can only claim the sums paid by them for interest, but not interest upon the sum paid by them for interest.

[They referred to *Rigby* v. *Macnamara* (2); *Bell* v. *Free* (3); *De Haviland* v. *Bowerbank* (4); *De Bernales* v. *Fuller* (5); *Ex parte Chippendale* (6).]

Northmore Lawrence, for persons in the same interest.

Cotton, Q.C., and *North*, for the official liquidator and three of the persons who signed the promissory notes:—

The general rule as to the guarantee upon a promissory note is that the surety is entitled to complete indemnity, and he is therefore entitled to interest upon all sums paid by him, whether for principal or interest: *Petre* v. *Duncombe* (7); *Hitchman* v. *Stewart* (8); *Fergus* v. *Gore* (9).

J. Pearson, in reply.

(1) Law Rep. 3 Eq. 688; Ibid. 3 Ch. 167.
(2) 2 Cox, 50.
(3) Wils. Ch. Ca. 51.
(4) 1 Camp. 50.
(5) 2 Camp. 426.
(6) 4 D. M. & G. 43.
(7) 20 L. J. (Ch.) 242.
(8) 3 Drew. 271.
(9) 1 Sch. & Lef. 107.

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MALINS, V.C.:—

This contract is of a peculiar nature, throwing upon the shareholders a liability to contribute rateably according to the number of their shares towards this debt, over and above the amount of their shares. It is a contract which ought, I think, to be construed strictly in favour of the sureties, and against those who have to pay. They have contracted to pay the principal sum of £30,000 and interest, but I understand that this sum has been reduced to £15,000 by payments already made. If the debt had remained due to the original creditor, the official liquidator would not, as I understand, have claimed more than the £15,000, with simple interest from the time when the money was advanced; but it is said that because the sureties paid part of the debt, and interest upon it, they are now entitled to have interest upon all the money they so paid. In ordinary cases, when a surety is called upon to pay, and has a contract of indemnity from the debtor, it is not unreasonable that there should be a full indemnity, and that the principal debtor should reimburse him all the money he has paid, with interest. Therefore, upon principle, I should dissent from the decision in *Rigby* v. *Macnamara* (1). That case was followed by Sir *Thomas Plumer* in *Bell* v. *Free* (2), but I do not think the latter decision could be supported at the present day. I am warranted in saying that, because in the case of *Petre* v. *Duncombe* (3), at common law, the same question arose, and was decided in a manner completely at variance with *Bell* v. *Free*. The case of *Bell* v. *Free* is, I think, a most unreasonable decision, and one which Sir *Thomas Plumer* could only have come to because Lord *Loughborough* had decided the same way in *Rigby* v. *Macnamara*. The whole current of authority from that time has been the other way. Sir *Richard Kindersley*, in the case of *Hitchman* v. *Stewart* (4), decided that a surety was entitled, as against his solvent co-sureties, to be repaid their shares of what he had paid, with interest from the time of payment; and *Petre* v. *Duncombe* also decided that a surety was entitled to recover not only the principal money paid, but interest upon it. The cases of *De Haviland* v. *Bowerbank* (5) and *De Bernales* v. *Fuller* (6), relied upon by

(1) 2 Cox, 50.
(2) Wils. Ch. Ca. 51.
(3) 20 L. J. (Ch.) 242.
(4) 3 Drew. 271.
(5) 1 Camp. 50.
(6) 2 Camp. 426.

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Sir *Thomas Plumer* in giving judgment in *Bell* v. *Free* (1), are cases at law only. I take it to be quite clear that in this Court, where a surety pays money for his principal, he is entitled to be repaid with interest from the time of payment.

Then why do I come to the conclusion that the rule does not apply to the present case? This is a contract quite out of the ordinary way. It is a contract to bind the shareholders of the company—not the particular persons who signed the deed at the time the contract was entered into, but all the persons who, year after year, might become shareholders; and it being clear that only the original sum with interest could have been recovered by the original creditors, it seems to me that the liability of the shareholders cannot be increased by the accidental circumstance that the original persons who gave the notes and paid the debt refrained for many years from calling upon the shareholders to pay the interest. I must look at the case as if the company had been a successful one and had continued to carry on their business. The sureties had the right as soon as they paid the money to call upon the shareholders to reimburse them, and this they omitted to do. According to their contention a shareholder not a party to the original contract, but coming in afterwards, and thinking that he was only liable to the contract as it existed on the face of the instrument, would find himself liable to pay a much larger sum than £30,000, namely, interest upon the sums which the sureties paid many years before.

Therefore, although the general principle is in favour of the claim to interest so far as it is a case of principal and surety, yet upon the particular terms of this contract I must come to the conclusion that the liability to pay interest upon interest has not been established. Therefore the sureties must simply stand in the place of the original creditors for whatever sums they have paid.

The Court being of opinion that the interest mentioned in the second schedule should be disallowed, there will be a reference to Chambers to consider what the amount of the call should be.

C. A.

McKewan and other of the parties who had moved before Vice-Chancellor *Malins* appealed from this order, and the claimants in

(3) Wils. Ch. Ca. 51.

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respect of the £20,000 and £10,000 debts presented a cross appeal to have the interest on interest allowed. The appeal was heard on the 11th of July.

J. Pearson, Q.C., and *Burton Buckley*, for *McKewan* and others:—

We say that the capital is defined by the memorandum of association, which it is not competent to alter by the articles. The capital is to be £160,000, and to make the articles legal the £30,000 must be part of the £160,000, otherwise you have a capital of £190,000, thus making the articles contradict the memorandum. Under the *Companies Act*, 1856, s. 61, the liability of the shareholders is limited to the amount unpaid on their shares; we say, therefore, that the stipulations as to the £30,000 are illegal. If, however, the shareholders are liable to contribute to this £30,000, each is liable only for his own quota, and is not liable to contribute to the deficiency occasioned by the insolvency of others. *M'Inroy* v. *Hargrove* (1), and *Robinson's Executors' Case* (2), on which the Vice-Chancellor relied, turn on the general law of partnership, and do not affect the case. The proportion to be paid by each must be in the proportion his number of shares bears to the whole number of shares in the company, whether allotted or not.

North, Q.C., and *Bardswell*, for the official liquidator, were desired to confine themselves to the questions as to the amount of contribution:—

The Vice-Chancellor went on two grounds: first, that this clause in the articles is only an application to particular debts of the provisions in the Act as to contribution, and must be construed in the same way. If some contributories in a company cannot pay their calls, a larger call has to be made on the others, and so here. Secondly, that every shareholder agrees, both for himself and the others, that this contribution shall be made.

[James, L.J.:—If you carry that construction to its consequences, you must hold that each shareholder guarantees the payment of calls by the others.]

(1) 15 W. R. 777. (2) 6 D. M. & G. 572.

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C. A. 1877 McKEWAN'S CASE. Argument.

M'Inroy v. *Hargrove* (1) is similar.

[JESSEL, M.R.:—That case did not go on the form of the instrument, but on the fact that the adventure was a partnership adventure.]

In re Professional Life Assurance Company (2) supports the view of the Vice-Chancellor.

Judgment, C. A. Jessel, M.R.

JESSEL, M.R.:—

The first question that we have to decide is whether or not there is any reason why persons of full age and competent understanding, who have entered deliberately into a contract to pay certain sums of money for valuable consideration, should or should not be held bound by that contract. Of course it is perfectly plain that unless there is some reason of public policy or some statutory enactment which avoids the contract, the contract is binding. It is not alleged that there is any reason of public policy in this case, and accordingly it is a mere question of statutory enactment.

Now, first of all, what is the bargain? These people became shareholders in the company, with the articles and memorandum of association stating that the liability of the shareholders is limited, and then that the nominal capital of the company is £160,000, divided into 16,000 shares of £10 each. Then, by the articles of association, after reciting that there are two debts of £20,000 and £10,000 contracted on behalf of the company, for which six shareholders had given their joint and several promissory notes, it is provided:—[His Lordship read the 5th article.]

It is said that this contract is void, because it makes the shareholder liable to more than his £10 per share; in other words, if he has paid his £10 per share and the assets then fall short, there is a covenant that he will pay a certain proportion of those sums of £20,000 and £10,000 if called upon, and it is said the law does not permit such a contract.

Now it is not pretended that the *Companies Act*, 1856, under which this company was formed, contains any direct avoidance of the contract. It is not said that there is any section which says

(1) 15 W. R. 777. (2) Law Rep. 3 Ch. 167.

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in so many words that such a contract is void, but it is said that when we look to the enactments as regards the memorandum of association in the 61st clause of the Act, the inference is that it must be void.

Judgment, C. A. Jessel, M.R.

Now, first of all, the 5th section of the Act provides that the memorandum of association shall contain the following things: the liability of the shareholders, whether it is to be limited or unlimited; the amount of the nominal capital of the proposed company; the number of the shares into which such capital is to be divided; and the amount of each share. It is to be observed that it is not necessary to state in the memorandum what the liability of the shareholders is, but merely whether it is to be limited or unlimited, and that is exactly what has been done in this case. The memorandum, according to what I can state from my long knowledge of memorandums of association to have been the general if not the universal practice, says that the liability of the shareholders is limited, and says no more about limitation. Then, as to the articles of association, the Act provides by sect. 10, that when registered they shall bind the company and the shareholders therein to the same extent as if each shareholder had subscribed his name and affixed his seal thereto, or otherwise duly executed the same; and there were in such articles contained, on the part of himself, his heirs, executors, and administrators, a covenant to conform to all the regulations of such articles, subject to the provisions of the Act. Why may not the articles of association explain the limit of liability mentioned in the memorandum of association? The memorandum of association does what is required. It simply states that the liability is limited, and how it is limited may very well appear in the contemporaneous articles of association, and it is there shewn that the liability is limited to £10 per share, and a proportion of £30,000. If we construe this section fairly, it does not appear to me to contain anything preventing the extent of the limit from being expressed in the contemporaneous articles of association. It appears to me, therefore, that this argument is insufficient.

The other argument is derived from the 61st section. "In the event of any company being wound up by the Court or voluntarily, the existing shareholders shall be liable to contribute to

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the assets of the company to an amount sufficient to pay the debts of the company, and the costs, charges, and expenses of winding up the same, with this qualification, that if the company is limited, no contribution shall be required from any shareholder exceeding the amount, if any, unpaid on the shares held by him;" and the marginal note says, "Liability of present shareholders in respect of debts." The meaning of the clause is that a shareholder shall not, as regards the debts of the company properly so called, and the costs of winding up, be called upon to pay more than the amount there mentioned; but that is as between the shareholders and the creditors of the company. The present is the case of an arrangement *inter se* by the shareholders for indemnifying six of themselves against certain liabilities which they have assumed for the benefit of the company. There do not appear to be in the 61st section of the Act any express words bearing upon that liability, and therefore that section does not avoid the contract any more than the other sections to which we have been referred. It is no part of the duty of Courts of Justice, as I understand their duty, to be astute in finding reasons for avoiding men's contracts which, if not forbidden by statute, are reasonable; on the contrary, it is their duty, by all fair means, to endeavour to support such contracts. On this part of the case, therefore, I think the Vice-Chancellor is wholly right.

The second point raised, but not much insisted upon, was as to the number of shares in respect of which each shareholder was liable to contribute to these sums. The words are, "shall contribute and pay a proportional amount of the sums according to the number of shares held by each shareholder." I am satisfied that that means according to the number of shares held by each shareholder, having regard to the whole number of shares held, and, consequently, as the whole number of shares were not issued, we must take the proportion of the number of shares actually issued; and in this respect also my conclusion is the same as that of the Vice-Chancellor.

The third point is this: It appears that some of the actual shareholders are insolvent and cannot pay their proportions; and the Vice-Chancellor appears to have held that the solvent share-

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holders were liable to pay not only what I will call their original proportion, but also a further proportion to make up for the deficiency of the insolvent shareholders. Upon that part of the case I have the misfortune to differ from the Vice-Chancellor. The words are, as it appears to me, plain: that is, that each and every shareholder shall contribute his proportion and no more—that is, the fraction he is to contribute. It is then suggested that the articles of association amount not merely to a covenant that each individual for himself will pay his proportion, but a covenant that all the others shall pay. That might be so, no doubt, but it is not the natural meaning of the articles of association. We have to remember that the 10th section of the Act, which I have already read, says that the articles shall be construed as if they contained a covenant by the shareholder on the part of himself, his heirs, executors, and administrators, to conform to all the regulations of the articles, not a covenant that other shareholders shall conform to them. It appears to me, therefore, both from the natural reading of the articles and the interpretation put upon them by the Act of Parliament, that you cannot so extend the covenant.

The only other ground urged was this: that there is a general right in the case of all commercial speculations to make persons who agree to contribute for a specific proportion of debts, also contribute such further proportion as shall be required to be made by those who are unable to pay their proportion. Now, I demur to any such general proposition. No doubt in cases of partnership, where the fact of partnership is once established, then, whatever the words used in regulating the contribution *inter se* may be they are subordinate to the general agreement of partnership that the losses shall be made good; but where you do not establish a contract of partnership you have no guide but the actual words, and you cannot alter the contract upon any notion that it is a mercantile contract or non-mercantile contract. The contract must be interpreted, as it appears to me, according to the ordinary rules of construing contracts, and cannot be enlarged or extended upon any general notion that because the transaction into which the parties have entered was of a commercial or mercantile nature, a bargain to supply the deficiency of the insolvent share-

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holders is to be implied in addition to the bargain expressed in the articles.

It appears to me, on this point the Appellant ought to succeed.

James and Baggallay, L.JJ., concurred.

North, Q.C., and *Bardswell*, then opened the cross-appeal as to interest, but the Court, without calling on the other side, affirmed the decision of the Vice-Chancellor on this point, saying that there was no ground for going beyond the terms of the contract.

Solicitors: *Stevens, Wilkinson, & Harries; Field, Roscoe, & Co.*

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KERR *v.* CORPORATION OF PRESTON.

M. R. 1876 Dec. 18.

[1876 K. 83.]

Street—Building beyond Frontage Line—Consent of Local Authority—Penalties—Injunction to restrain Criminal Proceedings—Equity Jurisdiction—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 155, 156, 251, 252, 254.

A Court of Equity has no jurisdiction to restrain criminal proceedings for the recovery of a penalty imposed by an Act of Parliament for a breach of its enactments.

A board having statutory power to consent in writing to a particular act is not bound by tacit acquiescence.

The Plaintiffs, owners of a house and area situate in and fronting a street, altered the front of the house by throwing out bay windows projecting beyond the street line of frontage but not beyond the limits of the area. After the completion of the alterations the Defendants, the local authority, threatened the Plaintiffs with summary proceedings before the justices for the recovery of penalties under the *Public Health Act*, 1875, on the ground that the Plaintiffs had set forward their building without the written consent of the Defendants under sect. 156 of the Act.

The Plaintiffs then moved *ex parte* for an injunction to restrain the Defendants from taking these proceedings, alleging, 1, that as the alterations had been made over their own property, the Defendants, in threatening proceedings, were acting *ultrà vires*; 2, that the Defendants, having had notice of the Plaintiffs' intention to make the alterations, were bound by acquiescence; and 3, that the justices had no jurisdiction, as the Defendants had not made their complaint within six months after the alleged offence, as required by sect. 252 of the Act.

Motion refused.

Mayor of York v. *Pilkington* (1) disapproved of.

Observations on *Lord Auckland* v. *Westminster Local Board of Works* (2).

Statement.

THIS was an *ex parte* motion on behalf of the Plaintiffs, who were joint owners in fee of a house and area—the latter inclosed by an upright iron railing—situate in and fronting a street in the town of *Preston*, for an injunction to restrain the town corporation, acting as the local authority, from making or laying any complaint or information under the *Public Health Act*, 1875, or from taking any proceedings for the recovery of any penalty or otherwise under the said Act in respect of an alleged bringing forward of the front of the house.

The facts relied on by the Plaintiffs were as follows:—In the

(1) 2 Atk. 302.

(2) Law Rep. 7 Ch. 597.

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year 1875 the Plaintiffs proposed to alter the front of their house by throwing out three bay windows to form a shop front, projecting beyond the general street line of frontage, but not beyond the limits of the area in front of the house. The Plaintiffs informed the local authority of their intention to make the alterations, and several communications upon the subject passed between the parties, particularly as to the terms upon which the local authority should permit the works to be carried out, but no agreement was come to in the matter. Eventually, on the 18th of October, 1875, the Plaintiffs, being advised that they could proceed without the consent of the local authority, commenced the alterations in question, which were completed in the last week in March, 1876. The borough surveyor frequently visited the works during their progress, and no application was made to the Plaintiffs on the part of the local authority for the inspection of any plans until December, 1875, when, at the desire of the town clerk, the Plaintiffs' solicitor and architect produced to him and the borough surveyor the plans of the alterations. No objection was then made to the plans, but the town clerk informed the Plaintiffs' solicitor that he would lay the matter before the local authority for their consideration.

The Plaintiffs, however, heard nothing more upon the subject until the 12th of October, 1876, when they were served with a notice by the borough surveyor informing them that in making the alterations they had acted without the written consent of the local authority as required by sect. 156 of the *Public Health Act*, 1875; and that in default of their immediately setting back their building to its original frontage, the penalties specified by the Act would be enforced against them, and the necessary proceedings taken by the local authority for that purpose.

The Plaintiffs disputing the right of the local authority to compel them to set back their building, the town clerk on the 12th of December, 1876, informed the Plaintiffs' solicitor by letter of his intention to apply to the justices for a summons under the Act. The Plaintiffs thereupon issued a writ, and now moved for an injunction in the terms above stated (1).

(1) The *Public Health Act*, 1875 (38 & 39 Vict. c. 55), provides as follows:—

Sect. 155: "When any house or building situated in any street in an urban district, or the front thereof, has

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Chitty, Q.C., and *Humber*, for the motion :—

Our ground for this application—for which *Mayor of York* v. *Pilkington* (1) is a distinct authority—is that we have equitable defences which could not be satisfactorily urged and considered before a magistrates' tribunal.

In the first place we are building over our own land, and not over land belonging to the corporation. They cannot prohibit us from building over our area, which is private property, without paying us compensation under sect. 155 of the *Public Health Act*, 1875. Therefore, in threatening these proceedings before the magistrates, they are acting *ultrà vires*: *Lord Auckland* v. *Westminster Local Board of Works* (2).

Secondly, the corporation are bound by acquiescence, for

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been taken down, in order to be rebuilt or altered, the urban authority may prescribe the line in which any house or building, or the front thereof, to be built or rebuilt in the same situation shall be erected, and such house or building, or the front thereof, shall be erected in accordance therewith.

"The urban authority shall pay or tender compensation to the owner or other person immediately interested in such house or building for any loss or damage he may sustain in consequence of his house or building being set back or forward, the amount of such compensation, in case of dispute, to be settled by arbitration in manner provided by this Act."

Sect. 156: "It shall not be lawful in any urban district, without the written consent of the urban authority, to bring forward any house or building forming part of any street, or any part thereof, beyond the front wall of the house or building on either side thereof, nor to build any addition thereto beyond the front wall of the house or building on either side of the same.

"Any person offending against this enactment shall be liable to a penalty not exceeding forty shillings for every day during which the offence is continued after written notice in this behalf from the urban authority."

Sect. 251: All offences and penalties under the Act . . . may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts before a Court of summary jurisdiction . . . consisting of two or more justices of the peace in petty sessions, &c.

Sect. 252: "Any complaint or information made or laid in pursuance of this Act shall be made or laid within six months from the time when the matter of such complaint or information respectively arose. . . ."

Sect. 254: "Where the application of a penalty under this Act is not otherwise provided for, one half thereof shall go to the informer, and the remainder to the local authority of the district in which the offence was committed: Provided, that if the local authority are the informer they shall be entitled to the whole of the penalty recovered. . . ."

(1) 2 Atk. 302.

(2) Law Rep. 7 Ch. 597.

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Argument.

although they were well aware of our intention to build, yet they raised no objection until the notice of the 12th of October, that is, after the works had been completed and our expenditure incurred.

Thirdly, the magistrates have no jurisdiction, for, under sect. 252 of the Act, complaint must be made within six months from the time the alleged offence has been committed, whereas upwards of six months elapsed before the corporation raised any objection to our building.

Judgment.

JESSEL, M.R. :—

I am of opinion that this application ought not to be granted. It is an application of a novel character, though it seems to be not altogether without precedent; in fact it owes its origin to a precedent with which I am not unacquainted.

The object of the action is to restrain a local board from taking proceedings before the magistrates against the Plaintiffs by reason of his having advanced his building beyond the line of frontage. The main equity suggested on behalf of the Plaintiffs is that the local board knew of their intention before the erection of the building, yet stood by and allowed them to incur expense. A second ground of equity is suggested, namely, that the proceedings before the magistrate could only be taken within six months from the time of the alleged offence, and the six months had expired; and a third that the magistrates have no jurisdiction to interfere, except where the building complained of extends beyond the owner's own property.

In the first place, the Plaintiffs' last two objections are defences to the proceedings before the magistrates, and nothing else, and I am not going to assume that what may be valid defences will not be given full weight to by the magistrates. I must assume that the Legislature has given the magistrates the power to decide the question according to law, and no one is entitled to say that a Judge entrusted by the Legislature with judicial power is incompetent to exercise it.

The first question is whether there is equity to restrain a proceeding of the kind now threatened. It is a criminal proceeding instituted by information in the usual way, and seeking to recover a penalty for a breach of certain laws which are sanctioned by the Legislature.

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Why ought a Court of Equity to interfere with the ordinary proceedings of a criminal Court? I am not aware that any such power exists. The point came before me in *Saull* v. *Browne* (1), where I declined to interfere with criminal proceedings or to follow Lord *Hardwicke's* doubtful decision in *Mayor of York* v. *Pilkington* (2).

My decision was appealed from, and the Lords Justices thought it a right decision. With the exception of that case before Lord *Hardwicke*, there is no instance in which a Court of Equity has interfered in criminal proceedings. I do not say that the Court might not interfere in a possible case, but as a general rule it will not.

Then I come to the question whether there is any equity at all. Now I have been referred to the case of *Lord Auckland* v. *Westminster Local Board of Works* (3), and speaking with all deference to the eminent Judges who decided it, it appears to me that sufficient attention was not paid to the real facts of that case. The Lords Justices dealt with the case as if the *Westminster* Board of Works had threatened to pull down what they had no right to pull down, and, that, being a wrongful act, they felt no doubt as to their jurisdiction to restrain it. If that had been the case here, I should, without that decision, have granted an injunction, just as in the case of a railway company exceeding its powers. But on reading the report, that was not the real state of the case at all. The *Westminster* Board of Works had not threatened to pull down the houses, but to apply to a magistrate for an order to pull down, and such an order could not have been made except by a magistrate, having jurisdiction to make it; so that the application was really to restrain the board, not from pulling down—as both the Lords Justices treated it—but from applying to a magistrate for an order to pull down. Consequently the judgment in that case has in fact no real application to the present case.

I cannot therefore treat that as a decision upon the question whether a Court of Equity will restrain an application to a magistrate for an order to pull down; it decided a totally different

(1) Law Rep. 10 Ch. 64. (2) 2 Atk. 302.
(3) Law Rep. 7 Ch. 597.

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point, and I therefore cannot consider it as an authority applicable to the present case. If there is any reason against the application the magistrate will listen to it and refuse to grant the order.

That being so, it seems to me that there is really no authority for an application such as this. The proceeding before the magistrate is a purely criminal one, for the information may be laid by anybody, and there is a special provision giving half the penalty to the informer, but if the local board is the informer it takes the whole penalty.

Then if the Plaintiffs have any equity, what is it? They say that the plans were shewn to the town clerk and borough surveyor. I will assume even that they were sent to the local board, though it does not appear that they were. Now the Act allows the local board to consent to buildings being set forward and so far interfering with the street; but it is only to be with their consent in writing: that is to say, the only power the local board has is to consent in witing. The local board is only a public functionary who can by a consent in writing consent to the owner of a building not conforming to the general law, which requires him to keep his building back to the original line of frontage.

Even if the Plaintiffs received no reply from the local board, that could not amount to acquiescence on the part of the board. The only power the board had in the matter was to consent; that consent they were to grant in one particular way; they could not dispense with the requirement of the Act, and no power short of an Act could allow them to dispense with that requirement. In the common case of acquiescence the man who acquiesces has a right to allow that to be done which he stands by and sees done; but here the local board had no right to do anything except give a consent in writing, therefore the ordinary doctrine of acquiescence could not apply. The case is simply this, that without waiting until the town clerk and surveyor took any steps after seeing the plans, the Plaintiffs proceeded with their building. Acquiescence on the part of the board is out of the question. The application must therefore be refused.

Solicitors: *Norris, Allens, & Carter*, agents for *W. Banks, Preston.*

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EARL OF EGMONT *v.* SMITH.

[1876 E. 29.]

SMITH *v.* EARL OF EGMONT.

[1876 S. 135.]

M. R.
1877
Jan. 18, 23.

Vendor and Purchaser—Right of Purchaser to separate Conveyances in Lots—Duty of Vendor to keep Property let and cultivated till Completion—Specific Performance—Making Auctioneer holding Deposit Defendant.

A vendor cannot object to convey to a purchaser in parcels by separate conveyances at one and the same time, if the purchaser requires him to do so and pays him the additional expense he thereby incurs; but *quære*, whether, in the absence of any stipulation, the vendor cannot object so to convey if the purchaser requires the conveyances to be made at different times.

When the vendor of a farm subject to a yearly tenancy finds that, without default on the part either of himself or the purchaser, the purchase cannot be completed on the appointed day, and that the tenancy will determine before actual completion, it is his duty as trustee for the purchaser, whether the tenancy be determined in the ordinary course by landlord or tenant or on a notice to quit given by the vendor at the request and for the convenience of the purchaser, to relet the farm on a yearly tenancy so as to prevent it going out of cultivation, unless he obtains an indemnity from the purchaser against all risk arising from its remaining unlet.

Although it is the law that an auctioneer holding the deposit on a purchase may be made a Defendant in an action for specific performance, yet, as a general rule, the proper practice is not to make him a Defendant when the deposit is of small amount, unless he refuses to pay it into Court when required; but where the deposit is of large amount, he may be properly made a Defendant, unless he has paid it into Court before action brought.

Statement

ON the 1st of June, 1875, the Plaintiffs in the first action, the Earl of *Egmont* and *Joseph Tarver*, as trustees with power of sale exerciseable at the request of the Plaintiff *M. G. S. Knapp* as tenant for life, caused an estate at *Shenley*, in the county of *Bucks*, to be put up for sale by auction by the Defendants Messrs. *Debenham, Tewson, & Farmer*, auctioneers, under printed particulars and conditions of sale.

The estate was not sold at the auction, but afterwards, on the 8th of July, 1875, an agreement in writing was entered into between the Plaintiffs the Earl of *Egmont* and *Tarver* (thereinafter called "the vendors") of the first part, the Plaintiff *Knapp*

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of the second part, and the Defendant *Augustus Albert Smith* (thereinafter called "the purchaser") of the third part, to which a print of the said particulars and conditions was annexed; and it was thereby agreed that the purchaser should purchase, at the price of £68,500, the *Shenley* estate as specified in the said particulars, and subject to the said conditions of sale so far they were applicable to a sale by private contract, and to a further stipulation that the purchaser should, upon signing the agreement, pay a deposit of 10 per cent. on his purchase-money to the auctioneers, Messrs. *Debenham, Tewson, & Farmer*. The purchaser's object in buying the estate being to resell it in lots, the agreement contained the following stipulation (clause 6) by way of addition to the 13th condition of sale: "The purchaser shall be at liberty to require the vendors to convey the property to him, or as he shall direct, in such portions and by such separate conveyances as he shall think fit; provided that the purchaser shall bear and pay all additional expense whatever incurred or sustained by the vendors in consequence thereof; and if the vendors or their solicitor shall enter, at the request or on behalf of the purchaser, into any negotiation or communication with, or furnish any abstracts, evidence, or information to any sub-purchaser or sub-purchasers from him, the same shall be without prejudice in any way to the vendors' rights and the purchaser's liabilities under this agreement, and shall not be deemed to be a recognition of such sub-purchaser or sub-purchasers, or a waiver or abandonment of any of the vendors' rights under this agreement; and the vendors shall not be required to execute any conveyance of any part of the premises except on payment of the entirety of the purchase-money and all interest, if any, due thereon, and all costs and expenses payable by the purchaser under this agreement or otherwise." The annexed conditions provided (13) that the purchaser should pay the remainder of his purchase-money on the 29th of September, 1875, at the office of the vendors' solicitor, and that upon such payment the vendors would execute a proper assurance of the property to the purchaser; that every such assurance should be prepared by the purchaser and tendered or left by him not less than ten days before the said 29th of September, 1875, at the office aforesaid; (15) that the rents or possession would be received or retained,

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and the outgoings discharged by the vendors or the tenant for life up to the said 29th of September, from which day the outgoings should be discharged and the rents or possession taken by the purchaser; and (16) that if from any cause whatever the purchase should not be completed on the said 29th of September, the purchaser should pay interest on the remainder of his purchase-money until completion. Then followed the usual condition limiting the time for requisitions.

The Defendant *Smith* duly paid the auctioneers the sum of £6850 by way of deposit, and made no objection to the title within the time limited.

On the 12th of August, 1875, *Smith* employed Messrs. *Debenham* to resell the estate by auction in lots, subject to certain conditions of sale which provided that vacant possession should be given to the sub-purchasers on the 25th of March, 1876; but only about half the property was resold.

Shortly after the date of the original contract, the Plaintiffs discovered that owing to the lunacy of the surviving trustee of an outstanding portions term, it would be necessary to obtain an order appointing a new trustee together with the usual vesting order, and that consequently the purchase might not be completed by the 29th of September, but to enable the Defendant *Smith* to give possession to his sub-purchasers on the 25th of March, 1876, the Plaintiffs at his request early in September served on the tenants of the farms which had been resold, and which were let on yearly tenancies, notices to quit expiring on the 25th of March.

When the time for completion of the original contract arrived *Smith* was not ready to pay the balance of his purchase-money, nor had he furnished the Plaintiffs' solicitors with the drafts of the several conveyances which he proposed should be executed to him in conformity with the contract.

The necessary vesting order as to the portions term having been obtained in December, 1875, the Plaintiffs' solicitor, on the 16th of February, 1876, wrote to *Smith's* solicitor consenting to completion being postponed until the 8th of April, upon the understanding that the drafts should be sent to him within a week. *Smith*, however, failed to send the drafts within that time,

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and accordingly, on the 15th of March, 1876, the Plaintiffs issued their writ in the first action against *Smith* and Messrs. *Debenham*, claiming specific performance by *Smith* of the contract of the 8th of July, 1875, and also payment into Court by Messrs. *Debenham* of the deposit of £6850, with the interest produced thereby.

On the same day, the 15th of March, the Plaintiffs' solicitor wrote to *Smith's* solicitor that the Plaintiff *Knapp* would at Lady Day, and without reference to the sub-purchasers, relet the farms, in respect of which notices to quit had been given.

Some correspondence then ensued between the Plaintiffs' solicitor and *Smith*, in the course of which, however, *Smith* made no reference to *Knapp's* intention to relet; and subsequently, on the 25th of March, *Knapp* relet the farms then becoming vacant to the existing tenants under agreements for yearly tenancies determinable at the end of the first or any succeeding year on six months' notice in writing.

One of the tenants to whom a farm was so relet was a farmer named *Clode*.

The drafts of the conveyances were ultimately received by the Plaintiffs' solicitor from *Smith's* solicitor on the 29th of March.

Smith, in his statement of defence, alleged that he had been ready and willing to complete his purchase on the 8th of April, 1876, the day fixed by the Plaintiffs' solicitor, and submitted that, under the circumstances, the action was wholly unnecessary and vexatious and in breach of the agreement come to for the completion of his purchase on that day. He further alleged that in consequence of the Plaintiffs having relet the farms as aforesaid, his sub-purchasers threatened proceedings against him for damages for non-delivery of possession to them. He also claimed, by way of counter-claim, a declaration that he was entitled to possession of the property as from the 29th of September, 1875; that the Plaintiffs were not entitled to be paid any interest on the unpaid purchase-money from the 29th of September, 1875, until delivery to him of possession; that the Plaintiffs had no right after the execution of the contract of the 8th of July, 1875, to create any tenancy whatever of any part of the property; and that the Plaintiffs were liable for all damage caused to him by reason of the tenancies created by them; and other relief.

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The Defendants Messrs. *Debenham* delivered a statement of defence, alleging that the £6850 deposit was received by them in the ordinary course of their business as auctioneers, and had since been held by them as stakeholders. They, moreover, submitted that they were improperly made parties to the suit, and were not bound to pay interest on the deposit, as they had held the money at call and at their own risk; and they stated their readiness to pay the money into Court when required. They subsequently paid the deposit into Court, and thereupon an order was made dismissing them from the action on payment of their costs by the Plaintiffs, the question by whom such costs should be ultimately borne being reserved till the hearing.

The action now came on for trial together with a cross action by *Smith* against his vendors and also against *Clode* for specific performance of the agreement of the 8th of July, 1875; to set aside the tenancies created by the vendors; and to turn *Clode* out of possession.

Clode claimed, by way of counter-claim, specific performance, if necessary, of the agreement under which his farm was relet to him.

The only points arising in the actions calling for a report were, first, as to the right of a purchaser to require the property purchased by him to be conveyed to him in portions by separate conveyances; secondly, as to the duty of a vendor to relet the property sold if it should become vacant before the completion of the purchase; and thirdly, as to the propriety of making an auctioneer who holds the purchaser's deposit a party to an action for specific performance.

Argument.

Davey, Q.C., and *Chapman Barber*, for the Plaintiffs in the first action, and the Defendants, other than *Clode*, in the second:—

The Defendant *Smith* is clearly in default, and therefore we are entitled to specific performance with costs.

As to our reletting the farms, we acted not only on *Smith's* implied assent, but also within our strict legal rights, for we were not to be left to the risk of the property remaining untenanted and without proper cultivation: *Phillips* v. *Silvester* (1), commented

(1) Law Rep. 8 Ch. 173.

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on in *Dart's* Vendors and Purchasers (1); *Sherwin* v. *Shakspear* (2).

The auctioneers were, under the circumstances, properly made Defendants, and we therefore ask that their costs may be added to ours and paid by *Smith*.

Chitty, Q.C., and *H. S. Leeson*, for *Smith*, contended, upon the facts, that the vendors had acted vexatiously in issuing their writ before the 8th of April, 1876, they having consented to postpone completion till that date.

Cookson, Q.C., and *Rigby* for *Clode*.

Judgment.

JESSEL, M.R., after stating the agreement of the 8th of July 1875, and reading clause 6, continued:—As I understand that condition, it is no more than the law would require. I take it that in no case can a vendor object to convey the sold property in parcels on receiving the whole purchase-money. Whether he could or could not object to convey it at various times is another matter, but that he could not object to convey on his being paid the additional expense occasioned by his joining in several conveyances instead of one, I am quite clear.

An ordinary contract of sale is not only to convey to the purchaser, but to convey as the purchaser shall direct. Whether or not he could be asked to keep his legal estate for a long period, and convey it in portions at various times is a question perhaps deserving of more consideration. But this condition does not exceed the ordinary law; it gives the vendors the additional expense; it gives them the whole purchase-money, and is not to operate as a waiver or abandonment of any of their rights.

With regard to the auctioneers having been made Defendants to the first action, if the Plaintiffs are right throughout, I think that, considering the deposit was £6850, not a mere trifling sum, they were justified in making the auctioneers Defendants. No doubt it is not the practice, although it is the law, that you may make the depositee or auctioneer a Defendant, because he holds the deposit for both parties, so to speak, and the party ultimately entitled gets the money.

(1) 5th Ed. p. 650. (2) 5 D. M. & G. 517.

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But the practice, and the proper practice, is not to make the auctioneers Defendants when they hold a small deposit. If they are applied to to pay the money into Court and they refuse to do so, it is time enough to make them Defendants.

As a general rule I should not encourage the practice of making auctioneers Defendants when they hold a small sum in their hands. I certainly should not sanction making them Defendants if it was merely a trifling sum, or an offer had been made to pay. But I think in this case there is no reason why the strict law should not be followed.

[His Lordship, after further detailing the facts of the case, and expressing his opinion that the vendors had acted kindly and liberally in acceding to the Defendant *Smith's* request to serve the notices to quit, they not being bound to do so, continued:—]

Now I have to consider the position in law of a vendor who, having sold estates subject to yearly tenancies which he is not compellable to determine, at the request and for the convenience of the purchaser gives notice to the tenants to leave.

I assume that without any default on either side, but by reason of those accidents to which all human affairs are exposed, it is impossible to complete on the day originally named, and that a vendor is informed and knows before the day arrives that it will be so impossible, and that consequently the farms will become vacant on the quarter day before the completion of the purchase. What is his legal position? I think it is his duty, as he has given the notices at the request of the purchaser, which he was not compelled to do, at least before reletting the farms to consult the purchaser to know if he wishes them relet, and he should give him notice that he intends to relet them. That it is his duty and obligation to relet them I have no doubt whatever. He is certainly a trustee for the purchaser, a trustee, no doubt, with peculiar duties and liabilities, for it is a fallacy to suppose that every trustee has the same duties and liabilities; but he is a trustee. For that I have the decision of the House of Lords in *Shaw* v. *Foster* (1), which only re-stated what had been the well-known law of the Court of Chancery for centuries.

As a trustee it is his duty to keep the property in a proper state

(1) Law Rep. 5 H. L. 321.

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of cultivation, reasonable regard being had to incurring a liability on his part. No one can pretend for a moment that a trustee of farms performs his duty by allowing those farms, situate, perhaps, in one of the finest counties in *England*, and readily lettable, to remain unlet and run the risk of losing the rent. It cannot be pretended for a moment that a trustee performs his duty who does that, or that a trustee who does that voluntarily and knowingly will not expose himself to a serious liability to the *cestui que trust* who loses his rent.

I have no doubt whatever that, on the general law, the duty of a trustee is to let the farms from year to year in order to obtain sufficient rent, and to keep the farms in a good state of cultivation. That, I have no doubt, is the general law. Whether the vacancy happen in the ordinary course of determining the tenancy either by the landlord or the tenant, or whether the vacancy happen because the landlord gave the notice at the request of the purchaser, appears to me as regards the subsequent liability wholly immaterial.

I think it is the proper course that the vendor should give notice of the impending vacancy to the purchaser, and ask him what he wishes to be done; because if the purchaser says I am willing to run the risk of the farms being unlet, and I will guarantee you against any loss that will arise to you in case the purchase goes off, it might be a proper thing to allow them to remain unlet.

[His Lordship then came to the conclusion, upon the facts, that with regard to the original action, the Defendant *Smith* had clearly accepted the Plaintiffs' title and had been in default throughout, and gave judgment against him for specific performance in the usual form, with costs, the costs of the auctioneers to be added to the Plaintiffs', and the whole costs to be paid by the Defendant: the Plaintiffs to have interest at 5 per cent. from the 29th of September, 1875, until completion, setting off the amount of rents and profits received by them since that date.

As to the cross action, his Lordship considered *Clode's* title indisputable, and that there was no reason whatever why he should be turned out of possession. He then continued:—]

As regards the vendors, in my opinion they acted not only fairly but with great caution and care. If anything has gone wrong as

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far as Mr. *Smith's* interests are concerned, he alone is to blame for it, through not taking any notice of Mr. *Knapp's* expressed intention to relet.

In my opinion his claim is utterly baseless and unfounded, for I cannot see how the vendors could, under the circumstances, assume otherwise than an assent on the part of the purchaser to their reletting, even supposing they had not been required by law to relet; and I should have held that they were exonerated by the correspondence from any liability for the reletting, even if my opinion as to the legal position of the parties had been different from what it is.

Therefore the proper order in the second action is to dismiss it with costs, which I do.

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Solicitors for Plaintiffs: *Iliffe, Russell, & Iliffe,* agents for *J. Parrott, Stony Stratford.*

Solicitor for Defendant *Smith: A. R. Oldman,* agent for *T. W. Salmon, Diss.*

Solicitors for *Clode: Perkins & Weston.*

In re PEN-Y-VAN COLLIERY COMPANY.

M. R. 1877 March 3.

Limited Company—Companies Act, 1862—*Voluntary Winding-up—Supervision Order—Creditor—Unliquidated Damages—Right to petition.*

An order continuing the voluntary winding-up of a company under the supervision of the Court can only be obtained on a petition by the company, a creditor, or a contributory.

A claim against a company for unliquidated damages on account of alleged fraudulent representation does not constitute the claimant a creditor, so as to entitle him to petition either for a winding-up order or a supervision order: before he can so petition he must make himself a creditor by changing his claim for damages into a judgment.

Statement.

IN January and February, 1876, the *Pen-y-Van Colliery Company, Limited,* passed resolutions for a voluntary winding-up, one *Jones* being appointed liquidator.

A petition was now presented by the *South Aurora Consolidated Mining Company,* praying that the voluntary winding-up might

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be continued under the supervision of the Court, and for the removal of the liquidator, under the following circumstances, as stated in the petition.

Shortly after the commencement of the winding-up of the *Pen-y-Van Company*, *Jones*, as liquidator, contracted to sell the company's collieries to one *Sarl* for £7000, of which £4000 was to be paid in cash and £3000 secured. Before the purchase was completed *Sarl* assigned his interest in the contract to the *Aberbeeg Collieries, Limited*, and *Jones* by *Sarl's* direction conveyed the *Pen-y-Van Collieries* by deed to the *Aberbeeg Company*, in consideration of £7000, of which £4000 was paid to *Jones*.

To enable them to pay this £4000, the *Aberbeeg Company* borrowed that sum, together with a further sum of £1000, from the Petitioners, the *South Aurora Company*, upon the security of an indenture dated the 6th of March, 1876, whereby the *Aberbeeg Company* mortgaged the *Pen-y-Van Collieries* to the *South Aurora Company* for £5000 and interest.

The petition then alleged that *Jones* was aware of the fact that the *Aberbeeg Company* had so borrowed the £4000 to enable them to complete their purchase; that he knew at the time of the sale to *Sarl* and of the mortgage to the Petitioners that the collieries were virtually exhausted; that he had plans in his possession shewing that the collieries had been worked out, but that these plans had been withheld from the Petitioners; and that the Petitioners advanced the £5000 on the faith of representations made to their agent by two shareholders of the *Pen-y-Van Company* and the overman of the collieries in October, 1875, before the winding-up, that the collieries were in course of being worked, whereas the collieries had turned out to be practically worthless, and wholly insufficient to secure the £5000.

Under these circumstances the Petitioners had recently commenced an action for damages against the *Pen-y-Van Company* and *Jones* as liquidator, and they now stated by their petition that they were advised the measure of the damages would be the said sum of £5000 and interest and expenses, and they accordingly claimed to be creditors of the *Pen-y-Van Company* for the amount of such unliquidated damages, and as such entitled to an order continuing the winding-up of that company under supervision.

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The Respondents, the *Pen-y-Van Company* and *Jones*, disputed the Petitioners' statements as to the condition of the collieries, and denied that there had been any misrepresentation.

Argument.

Ince, Q.C., and *Caldecott*, for the Petitioners:—

This petition is presented under sect. 147 of the *Companies Act*, 1862, which enables the Court to order a voluntary winding-up to be continued under supervision; and it has been decided that a creditor with an unliquidated claim may obtain a supervision order for the purpose of having his claim estimated in Chambers: *Re Yniscedwin Iron Company* (1). The claim can be more expeditiously and cheaply disposed of in the winding-up than by an action.

But even if we cannot be considered as actual creditors, still it does not follow that we cannot obtain a supervision order, for sect. 147 does not restrict the right to obtain such an order to particular persons, as the 82nd section does with regard to a compulsory winding-up order. The words "or others" in sect. 147 may well include persons having unliquidated claims for damages. The two subdivisions of the Act relating to "Winding-up by Court" (sects. 79–128), and "Winding-up subject to the supervision of the Court" (sects. 147–152), comprise, in fact, separate and distinct provisions.

Chitty, Q.C., and *Methold*, for the *Pen-y-Van Company*.

Mulligan, for *Jones*.

Judgment.

JESSEL, M.R.:—

I do not wish to hear you, Mr. *Chitty*.

There must be a time when the practice has finally put a construction upon an Act of Parliament. Here is an Act of Parliament passed in 1862, and I am asked to decide that nobody has hitherto understood the meaning of it in respect of one of its many provisions, that is, as to who may petition for a supervision order.

The practice, as far as I know, has been uniform. The Peti-

(1) 19 W. R. 194.

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tioner has always been the company, a contributory, or a creditor. There never has been, as far as I am aware, any difference suggested until to-day between a petition for a supervision order and a petition for a winding-up order by the Court. But it having been suggested to-day to the Court that there is a difference, it becomes necessary to consider the Act of Parliament to see whether what I believe to be the general practice is correct, or whether there is a power in anybody, who so desires, to petition against a company in voluntary liquidation or against the liquidators, to obtain a supervision order, though the same person could not have obtained a winding-up order from the Court. I think there is no such power. I admit this Act of Parliament, like many other long and elaborate Acts of Parliament, is open to some observation both upon the ground of omission and upon the ground of ambiguity; but still I think it is the duty of the Judge to endeavour to ascertain the intention of the Legislature by giving a reasonable meaning to the clauses of the Act, and not to say that a large proportion of them fail for the want of machinery to carry them out.

It is to be observed that this Act is divided into parts, and the fourth part begins in this way: "Winding up of companies and associations under this Act." This Part IV. begins with section 74, and goes on until we get as far as the 173rd section inclusive, when Part V. commences.

It is worth while considering the subdivisions of Part IV. The first subdivision is "Preliminary," the next is "Winding up by Court," the next is "Official Liquidators," then "Ordinary Powers of Court," then "Extraordinary Powers of Court," then "Enforcement of and Appeal from Orders," then "Voluntary Winding-up of Company." Therefore we find a voluntary winding-up of a company is a winding-up under this Act. And then, beginning with sect. 147, is "Winding up subject to the supervision of the Court." That is clearly a winding-up under this Act. Then there are "Supplemental Provisions," and then comes Part V. Those are the subdivisions.

When we come to the subdivision, "Winding-up subject to the supervision of the Court," which begins at sect. 147, we find this, that the Court may make an order directing that the voluntary

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winding-up should continue subject to supervision. Then the 148th section says, "A petition, praying wholly or in part that a voluntary winding-up should continue, but subject to the supervision of the Court, and which winding-up is hereinafter referred to as a winding-up subject to the supervision of the Court, shall, for the purpose of giving jurisdiction to the Court over suits and actions, be deemed to be a petition for winding up the company by the Court." That 148th section assumes that there must be a petition, though there is no direction given for the petition there, but it assumes a petition to wind up. The next section only refers to obtaining the opinion of creditors. Then the 150th refers to the order made, and empowers the Court to appoint an official liquidator. Then comes the 151st, which provides that where an order is made for a winding-up subject to the supervision of the Court, the voluntary liquidators may continue to exercise their powers as before, subject to any restrictions imposed by the Court; "but, save as aforesaid, any order made by the Court for a winding-up subject to the supervision of the Court shall for all purposes . . . . be deemed to be an order of the Court for winding up the company by the Court." That is what the order is to be.

I must here make one remark upon the 147th section, which says that where an order is made directing that a voluntary winding-up should continue, it is to be "subject to such supervision of the Court, and with such liberty for creditors, contributories, or others, to apply to the Court, and generally upon such terms and subject to such conditions as the Court thinks just." Now it is to be observed that the words "or others" are large, but I can see at once that there must be "others." For instance, there is a voluntary liquidator who may be displaced by the Court: he may have liberty to apply. There are a great many things which may entitle him to apply, and that alone would supply the word "others," without resort to the suggestion that it must be other people, who may be neither creditors nor contributories, but may have a remedy in damages.

Then the 158th section says this: "In the event of any company being wound up under this Act, all debts payable on a contingency, and all claims against the company;" that means, "however

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wound up under this Act," and it clearly applies to a voluntary winding-up, a winding-up by the Court, and a winding-up under supervision. In all cases the debts and claims are to be admitted to proof; but the Act treats "claims" as distinguished from "debts," thus shewing that a claim sounding in damages is not a debt, though it becomes provable under the winding-up, whatever the form of winding up may be; and the Act gives the claimant as well as the creditor a right to go in and apply to the liquidator. Of course if the liquidator does not admit the proof, then the claimant must take proceedings against the liquidator and turn his claim into a debt, and then when he obtains a judgment he becomes a creditor, and not before.

Now that being the position of matters, as the subsequent sections do not say by whom a petition for winding up subject to supervision is to be presented, you must go back to the earlier sections to see whether they do, and you find they do: for although the 2nd subdivision of Part IV. is headed "Winding-up by Court," yet the 82nd section is general; "Any application to the Court for the winding-up of a company under this Act shall be by petition;" that is, a winding-up not merely "by the Court," but "under this Act."

Therefore an application for winding up must include an application for winding up by the Court, and for a winding-up under the supervision of the Court. "It may be presented by the company, and by any one or more creditor or creditors, contributory or contributories of the company, or by all or any of the above parties together or separately." There is no reason in the world for cutting down the plain words of that section, except this, that the section is in the subdivision "Winding up by Court." That is a very poor reason: it is perverting the meaning of words which are inserted merely for facility of arrangement and making them control the literal words of the section. I am of opinion that this section is to be read literally, and that it shews that only the company itself, or a creditor or a contributory may petition for a winding-up order or for a supervision order. The 86th section confirms the view I have taken. "Upon hearing the petition the Court may dismiss the same with or without costs, may adjourn the hearing conditionally or unconditionally, and may make an

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interim order, or any other order that it deems just." "Any other order that it deems just" would include a supervision order. I have known the practice under the Act ever since it was passed, and no one has ever doubted that on the ordinary creditor's petition to wind up by the Court you may get a supervision order; and it has been frequently done, even when the voluntary winding-up has taken place after the presentation of the petition. I am clearly of opinion, therefore, that to obtain a supervision order you must proceed by petition, and that the petition must be presented by the company or a contributory or a creditor.

Now comes the next question: Are the present Petitioners, who are a company, creditors or contributories? Of course they are not contributories, and the only question therefore is whether they are creditors. Now the claim which the company brings forward is not a claim of debt, as I understand the meaning of it. It is a claim of a very singular kind. It is hardly possible to state it much more shortly than it is stated in the petition itself. [His Lordship then read the allegations in the petition as above stated, and continued:—] What possible claim there can be against anybody upon these statements I cannot understand. It is quite sufficient to say that the Respondents dispute the allegations about the overman, the shareholders, and everything else. There is not a *scintilla* of claim against *Jones*, who has sold to *Sarl*, and who has a right to be paid. He did not make the alleged misrepresentation, because he did not then exist as liquidator, for this was in 1875, the year before his appointment.

If there is a claim against anybody, it must be against the persons who made the misrepresentation. If they were authorized by the company to make it for the purpose of inducing the advance by the Petitioners to the *Aberbeeg Company*, they may or may not be liable; that I cannot tell. But it is a strange story. The advance is made to the *Aberbeeg Company* to enable them to complete the purchase from *Sarl*; and the representation is said to have been made in October, 1875, long before *Sarl* had purchased or agreed to purchase, and in fact long before the *Pen-y-Van Company* went into liquidation.

It is plain that there is no claim at all on these statements against anybody before me; but I think, as the point of law has

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been raised, it is right I should say that I do not think a claim for unliquidated damages, that is, a claim for damages for fraudulent representation, makes a man a creditor entitling him to petition under the Act either for a winding-up by the Court or a winding-up under supervision. He must change the claim for damages into a judgment, and thus make himself a creditor, before he can petition the Court.

I was quite prepared to dismiss the petition upon this ground; but I think it fair, considering the gross charges which have been made in it, to shew that there is in fact no claim at all.

The petition will therefore be dismissed with costs.

Solicitors: *Haywards, Keele, & Swann; Robinson & Preston,* agents for *Colborne & Ward, Newport, Monmouth; S. Mayhew.*

M. R. 1877 March 10.

In re LOWESTOFT, YARMOUTH, AND SOUTHWOLD TRAMWAYS COMPANY.

Tramway Company—Parliamentary Deposit—Petition for Return of—Promoters—Creditors—Winding-up—Tramways Act, 1870—*Board of Trade Rules, r.* 28.

The intention of the Board of Trade regulations under the *Tramways Act,* 1870, relative to the ultimate disposal of the deposit made by a tramway company on obtaining a Provisional Order authorizing the construction of their tramway, is (1) That the promoters of the company are not, by any subterfuge or device, to get back the deposit, either directly or indirectly, if the tramway is not completed: (2) That, on an application under the 28th rule for application of the deposit, the creditors only are to be considered, and not the shareholders: and (3) That the only creditors to be considered are meritorious creditors, coming with a *bonâ fide* case. Otherwise the deposit will be forfeited to the Crown.

Statement.

THE *Lowestoft, Yarmouth, and Southwold Tramways Company, Limited,* was formed and registered in November, 1871, for the purpose of making and working tramways in the county of *Suffolk* and elsewhere, and promoting local or other tramway companies; its capital consisting of £2000 in 2000 shares of £1 each.

The memorandum of association was subscribed by seven persons for one share each, which was allotted but never paid for, and

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1110 other shares were taken and paid for by the promoters of the company, five in number, consisting of three of the directors, the engineer, and the secretary. These 1117 shares were the only shares ever issued by the company.

Upon an application by the company under the *Tramways Act*, 1870, the Board of Trade made an order authorizing them to construct certain tramways, about ten miles in length, called the *Halesworth and Southwold Tramways*, and this order was subsequently duly confirmed by the *Tramways Orders Confirmation Act*, 1872 (No. 3).

Before the Provisional Order was delivered to the company they deposited in Court a sum of £1000, as required by the Board of Trade Rules made under the *Tramways Act*, 1870, the money being borrowed for the purpose by the five promoters of the company from a Mr. *Massey*, on terms of repayment in three months with a bonus of £80 and 10 per cent. interest, the amount being further secured by the promissory notes of the promoters.

At the expiration of the three months *Massey* was paid off by means of a sum of £1000 borrowed by the promoters, on the security of their promissory notes, from Messrs. *Reid Bros.*, their contractors, at 5 per cent. interest, upon the terms that Messrs. *Reid* should have the contract for constructing the *Halesworth and Southwold Tramways* at a total price of about £30,000. The advance was also made subject to a stipulation that neither the company's solicitors, parliamentary agent, nor engineer, should have any claim upon it for their services.

The tramways were never even commenced, and the company being in a hopeless condition—what money they had in hand having been expended on a tramway belonging to another company—a winding-up order was made on the 7th of December, 1874, on a petition by the company's solicitors as creditors for a bill of costs, and a liquidator was appointed.

The debts proved in the winding-up amounted altogether to £1301, the only creditors whose claims were allowed being the company's parliamentary agent, solicitors, accountants—of the firm of which the company's secretary and one of its promoters was a member—and one of the promoting directors, the debts being for services rendered in promoting the company and obtaining the

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Provisional Order. Upon these debts being proved, they were purchased by and duly assigned to Messrs. *Reid* for a total sum of £210.

A petition was now presented by the official liquidator asking that the £1000 deposit in Court, as constituting the only available asset of the company, might be paid out to the Respondents, Messrs. *Reid*, after deducting the costs of the present petition, of the Petitioners on the winding-up petition, and of the liquidation.

The loan by Messrs. *Reid* had never been repaid, and they did not prove their debt in the winding-up because, as they alleged, they believed that by purchasing all the proved debts they had constituted themselves the only creditors of the company, and had therefore become entitled as such to the balance of the deposit after payment of the costs above mentioned.

Argument.

Ince, Q.C., and *Crossley*, for the Petitioner:—

Our application is made under the latter part of rule 28 of the Board of Trade Rules (1), which provides that where a tramway company has been ordered to be wound up, the deposit may be applied for the benefit of its creditors as part of its assets.

The question is whether the deposit should be forfeited to the Crown, under the preceding part of the rule, or whether it should go to the creditors of the company.

The intention of the rule is that when the company becomes abortive the deposit shall not go back to the promoters: they are not to have the benefit of it in any way. The Crown has not any

(1) The Board of Trade Rules, so far as it is necessary to state them, are as follows:—

Rule 23 provides for payment into Court of the deposit by the promoters.

Rule 27 provides for the return of the deposit to the depositors on the completion of the tramway.

Rule 28 provides that if the promoters do not within the time prescribed in the Provisional Order or prolonged by the Board of Trade, or, if no time is specified, within two years from the passing of the Act confirming the Order, complete the tramway, then the deposit, after payment of compensation (if any) to road authorities, "shall either be forfeited to Her Majesty . . . . or in the discretion of the Court, if the promoters are a company, and such company is insolvent and has been ordered to be wound up, or a receiver has been appointed, shall wholly or in part be paid or transferred to such receiver, or to the liquidator or liquidators of the company, or be otherwise applied as part of the assets of the company for the benefit of the creditors thereof."

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meritorious claim to the money, and can only take it if there is no one else to take it: the creditors are really the persons first to be considered; *In re Bradford Tramways* (1): just as in the case of an abandoned railway; *Abandonment of Railways Act*, 1850, s. 29. Messrs. *Reid* are therefore entitled to the money as representing the creditors of the company.

Argument.

Chitty, Q.C., and *Woodroffe*, for the Respondents, Messrs. *Reid*.

Rigby, for the Crown:—

In deciding whether the deposit is to be applied for the benefit of the creditors, the Court is, according to the terms of the 28th rule, to exercise its discretion; that is to say, it must look into the circumstances of the case and see whether the persons claiming the money as creditors are in fact *bonâ fide* creditors as distinguished from promoters, the intention of the rule being, as pointed out in the case of the *Bradford Tramways*, that promoters are not to have the benefit of the deposit in any way.

Now, looking at the circumstances under which this company was established, it is impossible to come to any other conclusion than that it was a mere sham. The so called "creditors" were undoubtedly "promoters," for they took an active part in promoting the company; consequently they are not entitled to any consideration.

The deposit was never paid by the company out of their assets: it was money belonging to Messrs. *Reid*, and secured to them by the promissory notes of the five promoters. This is an ingenious device by which these promoters hope to relieve themselves from their liability, and thus evade the Board of Trade regulations. I submit, therefore, that the petition should be dismissed, but I do not ask for costs.

Ince, in reply.

Judgment.

JESSEL, M.R.:—

This is a petition by the official liquidator of a tramway company, asking, in substance, that a sum of money deposited under

(1) 4 Ch. D. 18.

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the provisions of an Act of Parliament and certain regulations of the Board of Trade which have the force of an Act of Parliament, may be distributed as part of the assets of the company. The petition is opposed by the Crown on the ground that the Act gives a mere discretion to be exercised by the Court, and that the Court ought not, under the circumstances which I am about to mention, exercise that discretion in favour of the applicant.

The discretion being left to me by the regulations of the Board of Trade, which have, as I have said, the force of an Act of Parliament, I must consider what the objects of these regulations were, and whether or not there has been a deliberate attempt to defeat those objects. If I should be of opinion that there has been such an attempt, I think it would follow that I ought not to exercise the discretion in favour of the applicant.

According to the rules, if the work is done, the deposit—which in this case was £1000—is to be paid out to the depositors; if the work is not completed within a specified time, then the deposit, if not applied in compensation, "shall either be forfeited to Her Majesty . . . . or in the discretion of the Court, if the promoters are a company, and such company is insolvent and has been ordered to be wound up, ... shall wholly or in part be paid or transferred . . . . to the liquidator or liquidators of the company, or be otherwise applied as part of the assets of the company for the benefit of the creditors thereof."

Now, the first question is this, was this company a reality? I am of opinion that although in form it was a company it really was not a company, but five people who manufactured a nominal company for their own purposes, under the circumstances that I am about to mention. The real promoters were these five people. I must look to the substance of the case to see whether I am justified in exercising this jurisdiction.

The next question I have to consider is, was the deposit made by the company at all; are they the people who made the deposit? I think they were not, and that will be seen when I detail the history of the matter.

Then are the creditors on whose behalf the application is really made meritorious creditors, and people whose claims ought to be considered? Still more, ought their assignees to be treated as

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meritorious creditors? There again I am adverse to the applicants.

The only guide to which I am referred in the shape of authority consists of some *dicta* of Sir *George Bramwell* in the case of *In re Bradford Tramways Company*. That case related to a private Act of Parliament which contained a section similar in terms to rule 28 of the Board of Trade regulations. Sir *George Bramwell* says this (1): "The Crown has not any meritorious claim, but takes it (the deposit) as a sort of vacant property that must go to somebody, just as it takes a fine." I am not quite sure that he is right there. It is, no doubt, in one sense a fine, but in another sense it is a compensation to the public—which a fine never is—for the injury done to the public by the non-completion of the tramway, for here the promoters have occupied the ground for two years, and prevented anybody else from making a tramway upon it. Then Sir *George Bramwell* proceeds: "But then, if there are unhappily, creditors who cannot get paid out of the assets of the company, the Crown's right to the fund (the Crown having, as I said, no particular meritorious claim to it) may be put on one side for the benefit of those creditors who otherwise would remain unpaid, and who are not guilty or responsible"—meaning, as I understand, responsible for getting up the company, and leaving the work undone, that is, for default—"but the promoters, as I have said, are not to get it, nor are the shareholders, who have done nothing to deserve it . . . . That being, to my mind, most clearly the scope and intention of the Act of Parliament, that is to say, that the promoters in the case supposed should not have the deposit, and that the Crown should take it if there is nobody else to take it (I leave out the payment of the compensation to landowners entitled), but that the creditors should take it, if there are creditors who would otherwise be unpaid"—that is, creditors who are not guilty or responsible—"it is manifest to my mind that it never was intended that it should, under any circumstances, be applied for the benefit of the shareholders."

Although those are merely *dicta* which relate to an analogous case, I think that, at all events, they afford a guide to this extent, that the intention of these regulations is that the promoters are

(1) 4 Ch. D. 21.

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not by any subterfuge or device to get the deposit money back again either directly or indirectly, if the work is not done; secondly, that the creditors only are to be considered and not the shareholders; and thirdly, that the only creditors who are to be considered are meritorious creditors, that is, persons who, as Sir *George Bramwell* says, are not guilty or responsible for what has happened in any shape or way. That is what I understand the Court of Appeal to mean.

But, in addition to that, there is a very serious consideration always to be attended to, and that is, that those who come here for what is in fact a gift to be made to them, not according to caprice, but in the exercise of a judicial discretion, must come here with clean hands and a *bonâ fide* case. Of course here the official liquidator himself is not personally responsible for what has happened. He only represents those who are. I must see whether they have a genuine *bonâ fide* case, and have fairly attempted to comply with the Act of Parliament, but by some misfortune, and not through any fault of their own, an event has happened which has prevented them.

[His Lordship then stated the facts, remarking that it was singular that the Board of Trade had, apparently without any inquiry into the means of the company, given them a Provisional Order for making a tramway about ten miles in length at an estimated cost of about £30,000, while the company formed by the memorandum of association consisted, in fact, only of seven "dummies," or subscribers for one share of £1 each, which was never paid. After expressing his opinion that the only object of presenting the winding-up petition evidently was to get back the deposit, his Lordship then continued:—]

Now, how can I possibly say that this is a case where I ought to exercise a discretion in favour of Messrs. *Reid*, who are really the only persons who can have any claim at all? The whole thing from beginning to end is a contrivance not to carry into effect but to evade the Board of Trade rules. It is quite clear that there was never any real deposit made within the meaning of the rules, which were made for the purpose of protecting the public against schemes of this kind. This is the exact scheme or sort of scheme which it was specially desired by the Board of Trade to prevent

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being carried out if possible, and with that view these rules were framed. I do not know that a better example could be found of what was intended not to exist. But then are these creditors who assigned their debts to Messrs. *Reid* in a better position than Messrs. *Reid*? The bulk of them are the very people who are the promoters of the company. I cannot treat the solicitors and the parliamentary agent as being in a better position than the engineer or the directors. They are the very people who promoted the company, and who are responsible for all that has occurred. It therefore appears to me that they have no meritorious claim whatever: still less have Messrs. *Reid*, who entered into this speculation with a view to getting what I have no doubt would have been a very beneficial contract if they had obtained it, but who, not having obtained it, have lost their £1000 which they have ventured upon the issue of this speculation. It appears to me that I should be entirely contravening the meaning of the regulations of the Board of Trade were I to allow any part of this money to be distributed partly in costs and partly in payment to Messrs. *Reid* of what they had advanced. Therefore I dismiss the petition, but without costs, as the Crown does not ask for them.

Solicitors for Petitioner: *Carr, Bannister, & Co.*
Solicitor for Messrs. *Reid*: *H. Harris.*
Solicitors for Crown: *Hare & Fell.*

KELLAND *v.* FULFORD.

M. R.
1877
March 26.

[1869 K. 32.]

Lands Clauses Act, 1845, *s.* 69—*Railway Company—Purchase of Infant's Real Estate—Purchase-money—Constructive Reconversion into Realty.*

Purchase-money paid into Court by a railway company under sect. 69 of the *Lands Clauses Consolidation Act*, 1845, for land of which an infant is absolutely seised in fee, remains impressed with the character of real estate, and on the death of the infant descends to his heir-at-law.

The word "settled" in sect. 69 means simply "standing limited."

Statement.

THIS was a suit instituted for the administration of the estate of *John Kelland*, an infant, who died in April, 1868.

In June, 1867, certain real estate of which the infant was seised

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in fee to his own use was taken by the *Devon and Cornwall Railway Company* for the purpose of their undertaking, and in April, 1871, the purchase-money, amounting to £517, was paid into Court under sect. 69 of the *Lands Clauses Consolidation Act*, 1845, and invested in £569 consols on the credit of the cause.

The cause now came on upon further consideration, and the question was whether the fund in Court formed part of the infant's real or personal estate.

Argument.

Chitty, Q.C., and *A. B. Bagnold*, for the Plaintiff, the heir-at-law:—

Purchase-money paid into Court under the 69th section of the *Lands Clauses Act* is to be laid out in the purchase of real estate, and therefore remains impressed with the character of realty: *Re Harrop's Estate* (1).

In *Foster* v. *Foster* (2), a case arising upon the 8th section of the *Partition Act*, 1868, incorporating sect. 23 of the *Leases and Sales of Settled Estates Act* (19 & 20 Vict. c. 120), your Lordship held—distinguishing your previous decision in *Steed* v. *Preece* (3)—that the proceeds of sale of an infant's real estate sold under the decree in a partition suit must be treated as realty.

As far as the present question is concerned, sect. 23 of the *Settled Estates Act* is identical with sect. 69 of the *Lands Clauses Act*.

[They were then stopped by the Court.]

Bagshawe, Q.C., and *Bevir*, for the next of kin:—

The point has never yet been decided upon the 69th section of the *Lands Clauses Act*. *Re Harrop's Estate* was a case upon a local Act which differed in terms.

Foster v. *Foster* is distinguishable, for there the Court had to consider the question of conversion as affected by the *Settled Estates Act*. When you are dealing with a case under the 23rd section of that Act, there must necessarily be a reconversion of the money into land, in order to keep the various parties entitled under the settlement in the same position as they were before:

(1) 3 Drew. 726. (2) 1 Ch. D. 588.
(3) Law Rep. 18 Eq. 192.

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you cannot, in fact, deal with the money except by considering it as land. But when you have a case under the 69th section of the *Lands Clauses Act*, where the person originally entitled to the land was absolute owner, and there is no settlement, there is no reason why the purchase-money should be considered as reconverted into land.

[JESSEL, M.R.:—In *Midland Counties Railway* v. *Oswin* (1) there are certainly *dicta* of Vice-Chancellor *Knight Bruce* in favour of reconversion, though he does not expressly decide the point.]

Those *dicta* are referred to by Lord *Cranworth* in *Ex parte Flamank* (2), but he nevertheless held that money paid in under the *Lands Clauses Act* for land belonging to an imbecile person was payable on his death to his executors as personal estate.

In re Taylor's Settlement (3), *In re Stewart* (4), and *In re Horner's Estate* (5), cases in which there was held to be reconversion, all related to settlements, and therefore do not apply to this case. Where there is a settlement there is an obligation to reinvest purchase-money in land from the nature of the limitations; but where you have an original absolute interest, as in the case of this infant, there is no such obligation imposed either on the Court or on the guardian of the infant.

The rule that money directed to be laid out in land shall be considered as land, applies only where the quality of land is imperatively fixed on the money: *Walker* v. *Denne* (6). Here, there being no settlement, this money is not necessarily impressed with the character of real estate. We submit, therefore, that the fund must be treated as personal estate.

Roxburgh, Q.C., and *Walter Coode*, for the Defendant *Fulford*, who had been appointed receiver of the infant's real estate.

JESSEL, M.R.:— Judgment.

The only singularity about this case is that it raises a question upon the construction of the 69th section of the *Lands Clauses*

(1) 1 Coll. 80.
(2) 1 Sim. (N.S.) 260, 268.
(3) 9 Hare, 596.
(4) 1 Sm. & Giff. 32.
(5) 5 De G. & Sm. 483.
(6) 2 Ves. 170.

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Consolidation Act, on which there has not as yet been any express decision.

The question is whether the 69th section effects what is called a constructive reconversion as regards purchase-money arising from land taken by a railway company and belonging to an infant, and which could not be conveyed except under the provisions of the Act.

The question depends entirely upon the construction of the section, and one must therefore consider first to what it applies. Now it applies to purchase-money or compensation in respect of lands taken from, first, a corporation which, not being beneficially entitled, has no power of sale, or which, being under some statutory disability, cannot sell: then a tenant for life or in tail—that is, a tenant in tail incapable of selling, as, for instance, where estates are settled and made inalienable by Act of Parliament, and a tenant in tail who is prevented by law from selling, as, for instance, a tenant in special tail after possibility of issue extinct, who for all purposes of alienation is considered merely as a tenant for life: then, again, a married woman seised in her own right or entitled to dower, who cannot sell except with the concurrence of her husband, they being together owners in fee: then a guardian or committee, neither of whom can sell for himself: then a trustee, executor, or administrator, who may have the entire fee simple like a corporation, and yet may not be able to sell. Thus we find that the great majority of the persons here described are persons taking under no settlement and having no settled estate at all in the real sense of the term.

Then the section goes on to direct that the money shall be deposited in the bank, and "shall remain so deposited until the same be applied to some one or more of the following purposes; (that is to say), In the purchase or redemption of the land tax, or the discharge of any debt or incumbrance affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith to the same or the like uses, trusts, or purposes."

Now the word "settled" does not mean "in settlement," in the usual sense of the term, but it means simply "standing limited." It must mean that or it would not in general apply to the case of

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a corporation, or of a married woman seised in her own right, or of a trustee, guardian, or committee, or in fact to half the cases mentioned in the previous part of the section. Then the section goes on, "or in the purchase of other lands to be conveyed, limited, and settled . . . . in the same manner as the lands in respect of which such money shall have been paid stood settled": meaning "stood limited," for the same reason that otherwise it would exclude half the cases previously mentioned. Then the section says the money may also be applied in removing or replacing buildings, thus further shewing an intention of placing the persons from whom the lands have been taken as nearly as possible in the same position as they were before. "Or in payment to any party becoming absolutely entitled to such money." That obviously means, "Entitled to his or her own use," as, for instance, where an infant attains twenty-one, or a married woman becomes discovert; that is to say—reading this 69th section with the 7th section—till the person becomes entitled to the money to his or her own use there is a constructive reconversion, which he or she on becoming so entitled can always stop, but until that event happens the money is to be laid out in lands or buildings to stand limited to the same uses as the lands sold stood limited, and therefore must be considered as land.

I hold, therefore, that there has been a reconversion of this fund; that it is still real estate, and that consequently it belongs to the infant's heir-at-law.

Solicitors: *Guscotte, Wadham, & Daw; Coode, Kingdon, & Cotton.*

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M. R.

1877

April 16.

LEACH *v.* JAY.

[1877 L. 40.]

Real Estate—Descent to Heir—Seisin in Law—Disseisin—Wrongful Possession by Stranger—Will—Dying "seised"—Technical Words—Construction.

R., being seised of freehold houses, died intestate in 1864, leaving *A.* his sole heiress-at-law. Upon *R.'s* death his widow wrongfully entered into possession, and retained possession till her death in 1869, when her devisees entered. *A.* died in 1871, without ever having entered into possession, having devised to *L.* "all real estate (if any) of which she might die seised."

An action having been brought by *L.* against the widow's devisees for recovery of possession, the devisees demurred to the statement of claim on the ground that *A.'s* devise did not pass the property or any right of entry therein to the Plaintiff:—

Held, that "seised" being a purely technical word must be construed according to its technical meaning; and that as the seisin in law which *A.* had on *R.'s* death had been destroyed, and she had not at her death any seisin either in law or in fact, the property did not pass under her devise.

Demurrer allowed, with costs.

Statement

DEMURRER.

The statement of claim alleged as follows:—

Robert Roberts, being at the time of his death seised in fee simple of certain freehold houses at *Brighton*, died intestate in 1864, leaving *Anne Roberts* his sole heiress-at-law, and thereupon the property descended to and became vested in *Anne Roberts* as such heiress-at-law, and remained so vested, and she had seisin in law thereof at the time of her death.

Upon the death of *Robert Roberts*, his widow, *Mary Roberts*, under colour of a pretended will of her husband in her favour, entered into possession of the property and retained possession until her death in 1869, whereupon her devisees, the Defendants, entered into and still continued in possession.

Anne Roberts died in 1871, having by her will, dated in 1870, after giving her residuary personal estate to the Plaintiff, *John Leach*, devised as follows:—"I also bequeath and devise to him" (the Plaintiff) "all real estate (if any) of which I may die seised."

The Defendants having refused to deliver up possession of the

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houses to the Plaintiff, or to recognise his title thereto as *Anne Roberts'* devisee, he brought this action, claiming to have his title established and to recover possession, with other relief.

M. R. 1877 LEACH v. JAY.

The several Defendants demurred to the statement of claim on the ground that *Anne Roberts'* devise did not, under the circumstances, pass the property or any right of entry therein to the Plaintiff; or, in other words, that *Anne Roberts* was not "seised" of the property at the time of her death.

Statement.

Ince, Q.C., and *Borrett*, for one of the demurrers:—

Argument.

We submit that the property in question never passed under *Anne Roberts'* will, for she did not "die seised" of it. The law is that immediately upon the death of an ancestor the heir acquires a possession or seisin in law: but this possession or seisin is only presumptive; for if there be an actual possession or seisin, either by right or by wrong, in any other person, such actual possession or seisin rebuts the presumption of a seisin in the heir: *Watkins* on Descents (1); the heir's seisin at law being, in fact, defeated by the entry of a stranger: *Cr.* Dig. (2); but it seems that if the heir is married at the time of the descent cast, his wife is entitled to dower, though he may have had seisin at law but for a single moment: *Watkins* on Descents (3); *Broughton* v. *Randall* (4).

The word "seised" is a technical word: *Co. Litt.* (5); and the rule in construing wills is that technical words are to be read in a technical sense unless the context contains a clear indication to the contrary: *Hawkins* on Wills (6).

[They were then stopped by the Court.]

Davey, Q.C., and *H. A. Giffard*, for the Plaintiff:—

The word "seisin," under the present law, has no technical meaning; it means now nothing more than "possession" or "title." If this testatrix had used the word "possessed" instead of "seised" her real estate would undoubtedly have passed: *Hogan* v. *Jackson* (7); *Monk* v. *Mawdsley* (8); *Noel* v. *Hoy* (9); *Thomas* v.

(1) 4th Ed. pp. 34, 40, 41.
(2) Tit. 1, s. 27.
(3) 4th Ed. p. 42.
(4) Cro. Eliz. 502.
(5) § 448, 266 b, note.
(6) Page 4.
(7) Cowp. 299.
(8) 1 Sim. 286, 290.
(9) 5 Madd. 38.

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Phelps (1); *Pittman* v. *Stevens* (2); *Davenport* v. *Coltman* (3). The devise of all her "real estate" includes, according to the definition in sect. 1 of the *Wills Act* (1 Vict. c. 26), any "right or interest" in land. She had such a "right or interest," for she had a right of entry in respect of which she might have brought an action of ejectment, and by sect. 3 of the *Wills Act* a right of entry is expressly authorized as the subject of a devise. This is real estate which would have passed to her heir in case of intestacy, for under the new law of descent (3 & 4 Will. 4, c. 106, s. 1), actual seisin is unnecessary, there being now no distinction between seisin in law and seisin in fact. Even under the old law seisin and possession were interchangeable terms, for *Bracton* (4) defines a freehold as "*civilem et naturalem possessionem seu seisinam*": *Co. Litt.* (5); *Britton* (6); *Jacob's* Law Dictionary, "Seisin."

We submit that the intention of the testatrix was to devise all real estate to which she was any way entitled, and that the word "seised" has not such a technical meaning as to be incapable of passing this property.

[They also mentioned 3 & 4 Will. 4, c. 27, s. 39.]

Chitty, Q.C., and *E. W. Byrne*, *Cookson*, Q.C., and *Hadley*, for the other demurrers.

Judgment.

JESSEL, M.R.:—

I have to construe this very concise devise: "I also bequeath and devise to him" (meaning the Plaintiff *John Leach*) "all real estate (if any) of which I may die seised." There is no context.

Now what is the rule of law? The rule of law is, no doubt, to ascertain the meaning of the expressions used by the testator—not to speculate or guess what the meaning may have been. The primary rule of construction, as laid down in *Abbott* v. *Middleton* (7), *Grey* v. *Pearson* (8), *Roddy* v. *Fitzgerald* (9), *Jenkins* v. *Hughes* (10), and other cases, is this—that where there is no context you are to

(1) 4 Russ. 348.
(2) 15 East, 505.
(3) 12 Sim. 588.
(4) ff. 206, 236.
(5) § 448, 266 b, note.
(6) f. 83.
(7) 7 H. L. C. 68.
(8) 6 H. L. C. 61.
(9) Ibid. 823.
(10) 8 H. L. C. 571.

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construe the will according to the ordinary grammatical meaning of the words used. Then there is a subsidiary rule laid down in *Roddy* v. *Fitzgerald* (1), that technical words shall have their legal effect, unless, from the context, it is shewn they bear another meaning.

In this particular will the testatrix, for what reason I know not, has used a technical word—a word not only technical, but a word that has no signification in ordinary language at all. It is a purely technical word; and it appears to me that the whole of my duty consists in ascertaining whether she was, at the time of her death, "seised"—according to the technical meaning of that technical term—of this real estate.

The facts as stated in the claim are these:—[His Lordship stated them as above.] Therefore the possession has been held adversely to *Anne Roberts* and her devisee from the time of the death of *Robert Roberts*. That being so, it is clear, according to law, that the legal seisin—that is, the seisin in law which *Anne Roberts* had at the time of the death of *Robert Roberts*, as distinguished from seisin in fact or deed—was destroyed and not restored at the time of her death. She had not then, either in law or in fact, any seisin. As far as this question is concerned it was not real estate of which she died seised, and that being so, whatever I may guess as to her meaning, however odd or capricious I may think such a will may be, I have no means of correcting it, or altering it, but I must decide it upon its literal meaning; and I therefore feel compelled—though, I must say, reluctantly—to allow this demurrer, which I do, with costs.

Solicitors: *Paterson, Snow, & Burney*, agents for *R. A. White, Grantham; White, Borrett, & Co.*, agents for *Taylor & Newborn, Epworth; T. F. Smallpeice*, agent for *Smallpeice & Sons, Guildford.*

(1) 6 H. L. C. 823.

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M. R.
1877
July 9.

BAYLIS *v.* TYSSEN-AMHURST.

[1877 B. 218.]

Lammas Lands—Right of Pasture—Common Appurtenant—Prescription—Long Enjoyment—Presumption of Legal Origin—One Commoner suing for himself and others—Pleading—Claim uncertain and unreasonable—Demurrer.

The Plaintiffs alleged in their statement of claim that they were owners and occupiers of lands and houses in a parish in which were certain lammas lands, partly freehold and partly copyhold of two manors, and over which the "owners and occupiers of lands and tenements" in the parish had from time immemorial "enjoyed as appurtenant to their respective lands and tenements in the parish a right of pasture for the cattle commonable thereon during the season between the removal of the crops in each year and the time of preparing the land for sowing in the next succeeding year;" that the precise commencement and close of the season were regulated by bye-laws made by the homage of one of the manors, the number of cattle which each owner or occupier was entitled to turn out in respect of his tenement being proportioned to the annual value of the tenement according to a scale fixed by the homage; and that the Defendant, the lord of the manor and tenant for life of the lammas lands, had recently inclosed parts of such lands, and had destroyed the pasture thereof, thereby depriving the Plaintiffs and such other owners and occupiers as aforesaid of their rights of pasture. The Plaintiffs, suing on behalf of themselves and all other owners and occupiers of lands and tenements in the parish, claimed by their action, (1) a declaration that they were entitled, "as appurtenant to their several lands and tenements within the parish, to a right of pasture upon the lammas lands for all their cattle commonable thereon during the season aforesaid, and under such regulations as should from time to time be prescribed;" (2) an injunction restraining the Defendant from inclosing any part of the lammas lands, and from destroying the pasture thereon, and otherwise interfering with the exercise by the Plaintiffs and such other owners and occupiers as aforesaid of their said rights; and (3) the quieting the Plaintiffs and the other persons entitled as aforesaid in the possession of their said rights.

The Defendant demurred to the statement of claim on the ground that the prescriptive right thereby claimed was uncertain and unreasonable, and could not be claimed for such a body of persons as that for whom the same was claimed; and that the general right set up by the Plaintiffs could not be claimed by prescription.

Demurrer allowed, with costs, but with liberty for the Plaintiffs to amend.

In order to make a right of pasture over common or lammas lands appurtenant to particular lands there must be some relation between the

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enjoyment of the right and the enjoyment of the particular lands; that is, there must be some connection between the beasts used on those particular lands and the number or description of beasts that may be depastured on the common or lammas lands: as, for instance, where the right claimed is for the beasts which plough the particular lands; or, for every beast used on such lands not exceeding a certain number.

In an action claiming rights of pasture, or rights of a like nature, it is the duty of the Court, as far as possible, to attribute a legal origin to such rights, where there is evidence of long-continued user, but that duty can only be discharged at the trial.

DEMURRER.

Statement.

The statement of claim in this action, after alleging that the Plaintiffs were owners and occupiers of certain lands and houses in the parish of *St. John, Hackney*, in the county of *Middlesex*, and that in the said parish there were certain open and common fields, partly freehold and partly copyhold of the manors of *Lords-Hold* and *Kings-Hold*, and commonly called "lammas lands," proceeded as follows:—

Paragraph 5. "All the said lammas lands have, during a time whereof the memory of man runneth not to the contrary, lain and still ought to lie as open and common pastures for the cattle of the owners of lands and tenements in the said parish of *St. John, Hackney*, and of their respective occupiers as hereinafter mentioned. And the Plaintiffs and their respective predecessors in title, and the respective tenants and occupiers of their said predecessors, and the other owners and occupiers of lands and tenements in the said parish have, during a time whereof the memory of man runneth not to the contrary, enjoyed as of right and without interruption, as appurtenant to their respective lands and tenements in the said parish, a right of pasture upon the said lammas lands for all their cattle commonable thereon during the season between the removal of the crops in each year and the time of preparing the land for sowing or the shutting up the same for grass crops in the next succeeding year. The precise commencement and close of the said season are regulated by bye-laws which anciently and of right were made by the persons entitled to exercise the said rights of pasture and the owners of the said lammas lands, and which, with their consent and on their behalf, were afterwards made by the courts of the said manors, or

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some or one of them, and for many years past have been so made by the homage of the said manor of *Lords-Hold*. And the number of cattle which each owner or his occupier is entitled to turn out in respect of his tenement is proportioned to the annual value of such tenement, according to a scale fixed by the said homage, which also appoints drivers and other officers for marking the cattle of the persons entitled to the said pasture rights, and enforcing the rules made for the better management of the said lammas lands."

Paragraph 6 alleged that the 12th of August in each year was, and for many years past had been, the fixed day for the commencement, and the 6th of April in each year was, and for many years had been, the fixed day for the close of the said season of open pasture; and it then went on to state the scale according to which the several owners of lands or tenements within the said parish and their respective occupiers had for many years past enjoyed, and then were entitled to enjoy, rights of pasture over the said lammas lands.

The Defendant was the lord of the said manors of *Lords-Hold* and *Kings-Hold*, and was seised as tenant for life under a settlement of certain portions of the said lammas lands, partly freehold and partly copyhold, held of the said manors, the residue of the lands being vested in numerous other persons.

The Plaintiffs further alleged that the Defendant had recently proceeded wrongfully to inclose parts of the said lammas lands of which he was so seised; had dug up, sold, and carted away large quantities of gravel and sand therefrom, and had destroyed the pasture and herbage thereof, thereby depriving the other owners and occupiers of lands and tenements in the said parish of the benefit of their rights of pasture over such lands.

The Plaintiffs sued on behalf of themselves and all other the owners and occupiers of lands and tenements in the parish of *St. John, Hackney*, except the Defendant and the other owners of lammas lands in the said parish, and claimed, 1, "A declaration that the Plaintiffs and the other owners and occupiers of lands and tenements lying within the said parish were entitled in right of and as appurtenant to their several lands and tenements within the said parish, to a right of pasture upon the said lammas lands

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in the said parish for all their cattle commonable thereon during the season aforesaid, and under such regulations as should from time to time be duly prescribed for the exercise thereof"; 2, An injunction restraining the Defendant from inclosing or permitting to remain inclosed any part of the said lammas lands which were vested in him subject to the said rights of pasture, and from digging up and carting away the gravel, sand, loam, and soil thereof, and from destroying the pasture, turf, and herbage growing thereon, and from otherwise preventing or interfering with the exercise by the Plaintiffs and such other owners and occupiers as aforesaid of their said rights; and, 3, that the Plaintiffs and the other persons entitled as aforesaid might be quieted in the possession of their said rights.

Statement.

The Defendant demurred to the statement of claim on the ground that the prescriptive right claimed by the 5th paragraph thereof, as above stated, was uncertain and unreasonable, and one which by law could not be claimed by, for, or on behalf of such a class or body of persons as that by, for, or on behalf of whom the same was claimed; and on the ground that such a general right as was set up by the Plaintiffs could not be claimed by prescription.

Argument.

Davey, Q.C., *Elton*, and *Tyssen*, for the demurrer:—

There is no instance to be found in which a prescriptive right such as that claimed by the 5th paragraph of this statement of claim has been sustained, for length of enjoyment of a right of this nature is not sufficient to raise the presumption of a legal origin: *Johnson* v. *Barnes* (1). What the Plaintiffs claim is a right of pasture, not as in gross, but as appurtenant to their lands: in order, however, to maintain such a claim it is necessary that they should shew some connection between the commonable beasts and the lands to which the right is claimed to be appurtenant; as, for instance, where a right or common of pasture is claimed for cattle levant and couchant on a particular farm: *Jones* v. *Richard* (2); *Hoskins* v. *Robbins* (3), citing *Fitzh.*

(1) Law Rep. 7 C. P. 592; Ibid. 8 C. P. 527.

(2) 6 A. & E. 530.

(3) Pollex. 21.

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Prescr. (1), where the law is thus stated: "One prescribed for sole-pasture from the time of carrying off the hay until Lady-Day, as belonging to his carve of land, without saying that it was for his goods levant and couchant; this was naught, for that he claimed one thing in gross as belonging to another thing in gross."

A right of several pasture can only be maintained, first, on an implied grant to a corporation, as in *Johnson* v. *Barnes* (2) and *Mellor* v. *Spateman* (3); or, secondly, to an individual, as in *Welcome* v. *Upton* (4) and *Potter* v. *North* (5); or, thirdly, by manorial custom, in the case of copyholders only: *Gateward's Case* (6); *Hoskins* v. *Robins* (7).

If the Plaintiffs' claim rests upon custom, it is bad, being a claim of a profit *à prendre in alieno solo*, which can only exist by grant or prescription; and if the claim is founded on prescription, it is equally bad, the Plaintiffs not being a corporation: *Constable* v. *Nicholson* (8). The commonable rights of individual freeholders were, no doubt, recognised and protected in *Warrick* v. *Queen's College, Oxford* (9), but that was a case of customary freeholders, who stood in a defined position towards the lord of the manor, and whose rights were determined by analogy to custom.

Several rights of pasturage cannot be claimed by different persons, for a grant of the same thing to, say, fifty different persons, would be absurd. A several pasturage can be the subject only of a single grant.

Again, the claim made by paragraph 5 is in reality for a right of common for so many cattle, and at such periods as a third person shall fix, a right which fails to satisfy the requirements of certainty, continuance, and reasonableness, and therefore cannot be maintained: *Le Case de Tanistry* (10); *Rowles* v. *Mason* (11); *Patrick* v. *Lowre* (12); *Clayton* v. *Corby* (13); *Bailey* v. *Stephens* (14); *Ackroyd* v. *Smith* (15).

(1) Page 51.
(2) Law Rep. 7 C. P. 592; Ibid. 8 C. P. 527.
(3) 1 Wms. Saund. 339, 343.
(4) 6 M. & W. 536.
(5) 1 Wms. Saund. 349.
(6) 6 Rep. 59 b.
(7) 2 Wms. Saund. 320, 323.
(8) 14 C. B. (N.S.) 230.
(9) Law Rep. 6 Ch. 716.
(10) Davis, 34.
(11) Brownl. & Gold., part ii. p. 85.
(12) Ibid. 101.
(13) 5 Q. B. 415.
(14) 12 C. B. (N.S.) 91.
(15) 10 C. B. 164.

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Moreover, the appurtenancy is too widely stated; it may be annexed to lands only, but not to "lands and tenements." Though the homage may make bye-laws binding on the copyhold tenants of a manor—*Fox* v. *Amhurst* (1)—those bye-laws cannot bind other persons.

[They also cited *Rigg* v. *Earl of Lonsdale* (2). They were then stopped by the Court.]

Chitty, Q.C., and *W. R. Fisher*, for the Plaintiffs:—

We ask the Court to presume a legal origin for this right from long and peaceable enjoyment: *Johnson* v. *Barnes* (3). It is a principle of law that when a right has been ascertained to be of long-continued duration, the Court is bound, if possible, to ascribe to it a legal origin: *Warrick* v. *Queen's College, Oxford* (4).

The Plaintiffs are owners and occupiers of lands in a parish, and what they claim to exercise over these lammas lands is not precisely a right of common, but an exclusive right of pasturage, a distinction which is pointed out in *Johnson* v. *Barnes* (5); and that exclusive right they claim to have in common as appurtenant to their tenements. They do not claim by custom, which would be bad, but by prescription, which can clearly be supported: *Grinstead* v. *Marlowe* (6), where, quoting from Lord Chief Justice *King's* manuscript notes in *Hardy* v. *Hollyday*, it is laid down "that the inhabitants of a vill or place cannot allege or plead a custom within such a vill or place to have an interest or profit *à prendre* out of another's soil. That the Plaintiff might have prescribed that he, and all those whose estate he hath in his house, have used to have common; but he cannot allege it by way of custom." An instance of a prescriptive right in the inhabitants of a parish is to be found in *Padwick* v. *Knight* (7), where it was considered that the inhabitants of a parish might have a prescriptive right to take stones from a waste for the repair of highways.

It has been said that where an inhabitant of a town has a right of common for his cattle his right is limited only to those cattle which

(1) Law Rep. 20 Eq. 403.
(2) 1 H. & N. 923.
(3) Law Rep. 8 C. P. 527.
(4) Ibid. 6 Ch. 716, 726.
(5) Law Rep. 7 C. P. 592; Ibid. 8 C. P. 527.
(6) 4 T. R. 717, 719.
(7) 7 Ex. 854.

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are levant and couchant within the town: *Rolle's* Abridg. (1); *Fitz.* Nat. Brev. (2); *Brooke's* Abridg. Tit. "Comoner & Comon" (3). But levancy and couchancy is not the only limit or stint, for in *Richards* v. *Squibb* (4) it was ruled by Chief Justice *Holt*, "that if a man prescribes for common for a certain number of cattle, as appurtenant, &c., it is not necessary, nor material, to shew that they were levant and couchant; because it is no prejudice to the owner of the soil, for that the number is ascertained."

Then, as to the homage fixing the stint, there is nothing contrary to law in saying that the homage may by agreement be the proper persons to regulate the right of pasturage, and there is no difficulty in proving a legal origin for the practice. It is well settled that the major part of the inhabitants of a parish may by mutual consent and agreement, in the Court-leet or Court-baron, or otherwise, make bye-laws which shall be binding on all the other inhabitants: *Watkins* on Copyholds (5); *Pratt* v. *Groome* (6); *Earl of Exeter* v. *Smith* (7). The Plaintiffs are not claiming an unusual right, for the custom of throwing open common fields at certain periods of the year as a common pasturage of a particular parish prevails in other parts of the kingdom: First Report of the Inclosure Commissioners under the *Commons Act*, 1876 (8).

[They also referred, upon the question of the commonable rights of inhabitants, to *Ivatt* v. *Mann* (9); *Commissioners of Sewers* v. *Glasse* (10); *Corbet's Case* (11); *Carr* v. *Lambert* (12).]

Judgment.

JESSEL, M.R.:—

I confess I know of no such right as is alleged here. I am quite as anxious as any other Judge ever was to find a legal origin for a long-continued user. I give no opinion as to what I shall do at the trial of this case—if it ever comes to trial—when I have the evidence before me. I am not at all satisfied that there is any such user as is here alleged, therefore I am dealing with a purely hypothetical case, as far as I am concerned.

(1) Page 398, G. 3.
(2) 180 B.
(3) Pl. 8.
(4) 1 Raym. 726.
(5) 4th Ed. p. 384, n.
(6) 15 East, 235.
(7) Carter, 179.
(8) Pages 1 and 2.
(9) 4 Scott, N. R. 342.
(10) Law Rep. 19 Eq. 134.
(11) 7 Rep. 5 a.
(12) Law Rep. 1 Ex. 168.

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In my opinion, the right must be better stated than it is in the 5th paragraph of the statement of claim. As far as I know, I never heard of such a right, and all the investigation which has been made on both sides has not produced an authority for it. Therefore I must assume that there is no such authority.

These are lammas lands, that is, lands which, as I understand the meaning of the term, belong to a person who is absolutely the owner in fee simple, to all intents and purposes, for half the year, and the other half of the year he is still the owner in fee simple, subject to a right of pasturage over the lands by other people. Now what that right of pasturage is, of course must be determined by usage, or, as lawyers call it, prescription, which means an implied grant by a former owner of the lammas lands to other people who have the right of pasturage.

Now, in the first place, this right of pasturage, as far as I can understand it, over lammas lands, is always a right annexed to the ownership of some other lands. I use the term "annexed" advisedly. That right, of course, must be determined on the ordinary principles of law, and those principles, as I understand them, say, that where the right is annexed to other lands, the right must have some connection with those other lands to make it what is called appurtenant; that is, there must be some relation between the enjoyment of the right and the enjoyment of those other lands. You may have various connections. The commonest of all is where the right enjoyed is with respect to the beasts which plough the land. The beasts used for ploughing are fed in winter from the land which they plough, and in the summer, in ordinary commons, they go upon the commons. Or it may be the other way, like these lammas lands, where the lands are cultivated till August, and then the beasts are driven upon them in the winter months. That is one connection. It may be the plough beasts.

There may be various other connections. You might, for instance, have a right to depasture so many beasts as are required to manure the land. You might have various other suggested connections between the beasts used on the land and the number of beasts that might depasture. You might require the beasts for various purposes on the land occupied; and those beasts, not

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exceeding a certain number, might be depastured on the lammas lands or the common lands, as the case may be. But in all ways there must be some connection between the occupation of the lands in respect of which the right is enjoyed and the right itself, which connection from its nature must to a certain extent limit the right enjoyed. You might say for every beast used on the land, not exceeding one beast per acre, there might be a right of common. But used in some way on the land, I think the beasts must be, to make the right appurtenant; otherwise, I do not see what the meaning of the word "appurtenant" is. It is a right appurtenant to the land.

That being so, I cannot find here the nature of the appurtenancy stated. It is stated to be appurtenant. I think the nature of the appurtenancy must be stated.

Then, in the next place, it is said that these lammas lands lie "as open and common pasture for the cattle of the owners of lands and tenements in the parish, and of their respective occupiers as hereinafter mentioned." Now "owners of lands and tenements," I think, must be restricted to "owners of lands." I do not understand the right being appurtenant to a church steeple. I think it must mean land, and nothing else. I think it would be safer so to allege it.

Then there are the words "hereinafter mentioned." How? In the first place, you must have a season. It is from time immemorial, and I cannot conceive it possible that there should be no precise commencement and close of the season, but that it was anciently and at all times regulated by the people themselves. I do not think it is fair to assume that there was originally a grant made in terms that the time of closing and opening the pasture should be determined by the people who had an interest in making it as long as possible; for as I read the pleadings in paragraph 5, the season is in reality an artificial season determined by the persons themselves in whom the right is. I think that is not rational. If the season alleged had been a natural season merely, that is, if it had been stated as "the season between the removal of the crops in each year and the time of preparing the land for sowing," and nothing more, I should have thought it would have been good, because the season is regulated by the law of nature

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and by the custom of the country and husbandry. Therefore I think you must have some precise term for it. The law requires precision of some kind, although, I agree, it does not require precision to a day, and that season would do very well if the season had been between the sowing and the removal of the crops; because when a man had sown his land you could not come upon it. He would give notice of that; and when he removed his crops every one would see and come upon the lands. I cannot agree that you can have a legal custom to be determined by the people whose interest it is to make it different from what it is. I think, therefore, if you want to allege a legal custom, you must have a proper beginning and proper ending.

In the next place, I do not think this can be a legal custom, that is, that it could have occurred time out of mind, or from time immemorial. The statement says that the right is in proportion to the annual value of such tenements according to a scale fixed by the homage of the manor of *Lords-Hold*. Now, annual value is, of course, constantly varying, and one can hardly imagine that before legal memory they could have decided the annual value varying from year to year, not according to the actual value, but according to what the homage of a particular manor in part of the parish should determine. It does appear to me, I must say, inconsistent with the notion of ancient legal right, and I think it will be found that no such allegation from time immemorial could possibly be maintained as a reasonable thing to attribute to the time before King *Richard* I., which is the meaning of time immemorial.

A man may certainly have agreed with another, or with a dozen others, that every body shall turn out according to the value of his land, or according to the annual value of his land; and it may be that by agreement for many years past they have left that to the homage of a particular manor to determine, and have abided by it. But then the custom would be according to the annual value, or according to the fair annual value. The mode of determining it would not be proof of the custom or proof of the prescription, but merely of the usage which had been adopted for many years past. I think myself, as I said before, that that kind of limit, although possible according to annual

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value, is not possible in the mode alleged. In that respect also I think the pleadings require amendment.

I do not see any objection to the 6th paragraph, which states what has been the usage for many years past.

Now it is not for me to say in what way the Plaintiffs will state their case, nor is it for me to say what amendments may be allowed, if necessary, at the trial of the action; but I will say this, so far as I am concerned, that I entirely assent to what has fallen from eminent Judges, to the effect that where long-continued user is proved of a beneficial enjoyment of rights of this kind, the tribunal ought not to be astute to destroy those valuable rights on any technical notion that a legal origin could not be attributed to them. It is the duty of the Judges, as far as it is possible to do so, to attribute a legal origin to the actual exercise of those rights. But that is a duty which I think can only be discharged on the trial of the action, when the Judge knows what the facts are and what the evidence really is on which he is called upon to adjudicate. It seems to me that it is the duty of the pleader to state what is undoubtedly considered the legal right, and that it is the duty of the Judge at the trial to ascertain whether the evidence supports that supposed legal right, or can fairly be allowed to support some other legal right. In that case, of course, subject to the rights of the Defendant, he would allow proper amendments with that view.

This being the state of the case, according to my notion of these pleadings—though I confess the subject is one by no means free from doubt or difficulty—I feel compelled to allow this demurrer with costs; the Plaintiffs to have leave to amend.

Solicitors for Plaintiffs: *Horne & Hunter.*
Solicitors for Defendant: *Cheston & Sons.*

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GRIFFITH *v.* PAGET.

M. R.
1877
July 12.

[1877 G. 75.]

Company—Voluntary Liquidation—Preferred and Deferred Shares—Rights and Interests in Capital—Companies Act, 1862, *s.* 133.

The articles of association of a limited company whose capital was divided into preferred and deferred shares provided that, subject to the difference in dividing the profits, the preferred and deferred shares should rank equally in the company, and that there should be no difference between a preferred and deferred shareholder in respect to his *status* and liability to the debts and engagements of the company. The articles also provided for the dissolution of the company. On the voluntary winding-up of the company under sect. 133 of the *Companies Act*, 1862:—

Held, that the two classes of shareholders were in the same position, and entitled to the capital *pro ratâ*.

Statement.

THIS was the hearing of the action in a case which has already been reported on a motion for an injunction (1).

The Plaintiff (as stated in the former report) was the holder of thirty preferred shares in the *Argentine Tramways Company, Limited*, and brought the action, on behalf of himself and all other the holders of preferred shares therein, against the directors and the company, claiming a declaration that a resolution to allot shares in the *Anglo-Argentine Tramways Company, Limited*, to the deferred shareholders was *ultrà vires* and void, and that the whole of such shares ought to be divided amongst the preferred shareholders; and an injunction to restrain the Defendants from acting upon certain resolutions of a general meeting of the company so far as the same related to the allotment of such shares to the said deferred shareholders.

The *Argentine Tramways Company, Limited*, was registered in September, 1871, with the object of acquiring and working certain tramways, and it was provided by the memorandum of association that the capital should be £250,000, divided into 15,000 preferred shares of £10 each, and 10,000 deferred shares of £10 each. Each of the said preferred shares was to be entitled in each year to a preferential dividend at the rate of 12 per cent.

(1) 5 Ch. D. 894.

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per annum on the amount for the time being paid up on each share, but was not to be entitled to participate further in the profits of the company. The deferred shares were not to be entitled to participate in any year in the profits of the company until the preferential dividend should have been paid up on the preferred shares for the current year and all preceding years; but any deficiency in the preferential dividend in any year was not to be deemed to bear interest. Subject, however, to the payment in manner aforesaid of the preferential dividend, the net profits of the company were to belong to and be divided amongst the holders of the deferred shares in proportion to the number of such shares respectively held by them.

The 17th, 18th, 19th, and 20th articles of association contained the same provisions as to the capital, and as to the two classes of shareholders, that were contained in the memorandum of association. The 21st article provided as follows: "Subject only to the differences above mentioned, the preferred and deferred shares shall rank equally in the company, and, except as aforesaid, there shall be no difference between the *status* and liability to debts and engagements of the company of the holder of a preferred share, and the *status* and liability to such debts and engagements of the holder of a deferred share."

The following articles were also material:—

"146. The dissolution of the company may be determined on for any purpose whatsoever, and whether the object shall be the absolute dissolution of the company, or the reconstitution or modification of the company, or the amalgamation of the company with any other company, or any other object.

"147. The dissolution of the company shall take place whenever it shall be determined on, as provided by these presents, and according to the terms and conditions so determined on.

"148. Provided that no absolute dissolution of the company (not being a winding-up by a Court under statute) shall take place, if at or before the general meeting at which the special resolution to dissolve the company is or is not intended to be confirmed, any of the members or shareholders shall enter into a binding and sufficient contract to purchase, at par or as may be agreed on, the shares and stock of all the members who wish to

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retire from the company, and shall make sufficient provision for their indemnity against the liabilities of the company."

The preferred and deferred shares were duly allotted, and were paid up in full, the chief holders of the deferred shares being the directors and their friends.

The directors had, under the circumstances stated in the former report (1), prepared a provisional agreement with a new company, called the *Anglo-Argentine Tramways Company, Limited*, having a capital of £165,000 in 33,000 shares of £5 each, for the transfer to such company of the whole of the assets of the Defendant company, retaining only sufficient cash to pay the dividend for the year ending the 31st of December, 1876. In consideration of this transfer, the new company was to issue to the Defendant company as fully paid up the whole of its existing share capital, except seven shares which had been taken by the subscribers to the memorandum of association, and to undertake to discharge all the debts and liabilities of the company. It was proposed that the shares so to be issued should be divided as follows:—30,000 of such shares, representing the nominal amount of £150,000, to be allotted to the holders of the 15,000 preferred shares in the Defendant company, in proportion to their respective holdings, and the residue of 2,293 shares, representing the nominal value of £14,965, to be allotted to the holders of the 10,000 deferred shares.

On the 16th of March, 1877, a general meeting of the company was held, at which resolutions were passed for winding up the company voluntarily, and appointing liquidators, and authorizing the liquidators to carry into execution the provisional agreement.

Before the extraordinary general meeting was held for the purpose of confirming these resolutions, the Plaintiff brought the present action, and on the 28th of March moved for an injunction to restrain the directors from taking any steps to confirm the said resolutions, and the Master of the Rolls held that sect. 161 of the *Companies Act*, 1862, only enabled the general meeting to decide on the nature of the consideration to be accepted from the new company, but not on the mode of its distribution, and directed the motion to await the trial of the action (1).

(1) 5 Ch. D. 894.

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The action now came on for trial. It appeared that the Defendants, with the object of facilitating the proposed arrangement, had acquired with their own moneys all the deferred shares at the price of about 15*s.* per share. The preferred shares, so far as there was any market for them, were at par or thereabouts, but the profits of the company had hitherto been insufficient to pay more than 7½ per cent. on the preferred shares.

Argument.

Chitty, Q.C. (*C. H. Turner* with him), for the Plaintiff:—

The 161st section of the *Companies Act*, 1862, does not authorize directors to wind up a going concern for the purpose of giving effect to an arrangement which will be highly beneficial to themselves, having regard to the relative values of the two classes of shares.

Davey, Q.C., and *O. L. Clare*, for the Defendants:—

The object of the directors was not to benefit the deferred shareholders, but to obtain a quotation on the *Stock Exchange*. The articles of association contain no provision as to the division of capital upon dissolving the company, and whatever may have been the relative rights of both classes of shareholders with respect to profits, as it is clear that now no more profits can be made, the surplus capital ought to be distributed between both classes of shareholders *pro ratâ*, without reference to their rights in respect of dividend while the company lasted, according to the 133rd section: *In re London India Rubber Company* (1). Under the arrangement the deferred shareholders will get less than they are entitled to, so that it is difficult to see what the preferred shareholders have to complain of.

Chitty, in reply.

Judgment.

JESSEL, M.R.:—

The question I have to decide is whether, according to the true construction of the Act of Parliament and the articles of association, on the voluntary winding-up of a company, the debts being all paid, the assets are distributable among the shareholders in proportion to their shares and capital; or whether, in distributing

(1) Law Rep. 5 Eq. 519.

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the capital and the assets, I am to take into account the dividends drawn by one or more classes of shareholders during the continuance of the company.

I will, first of all, consider it on general principles, as applicable to other partnerships; for, after all, these companies are commercial partnerships, and are, in the absence of express provisions, statutory or otherwise, subject to the same considerations. If in an ordinary commercial partnership one or more of the partners has a larger share of the profits than is the proportion borne by his share of the capital to the capital of the others, whether on account of his services (which is the more frequent ground, in cases of partnership, for giving the larger share), or on account of the services of others formerly given to the partnership, which is sometimes done, especially in the case of a second or third generation, that privilege ceases when the partnership is dissolved. If you give an annuity out of profits to a widow during the continuance of the partnership, she having no share of the capital, of course that, *ex vi termini*, will come to an end at the dissolution of the partnership. If you give a managing partner a salary, or a larger share of profits than his proportion of the capital, of course, at the dissolution, the management comes to an end and his larger share of profits.

But in the ordinary case, when the profits are unequally divided, —that is unequally, as regards the share of capital,—the same rule prevails, and that is quite independently of the circumstance whether the excess of profits is given for services, or given to a sleeping partner for the use of his name or otherwise.

When the partnership comes to an end, the right to the share of profits comes to an end also; and you distribute the assets, after providing for the profits earned up to the time of the dissolution, in proportion to the partners' shares of the partnership capital. That is the general rule of law in a commercial partnership. Therefore you would distribute the assets simply in proportion to the capital. This is a commercial partnership subject to certain statutory limits. Therefore, if there were no provision to be found anywhere, you would distribute the assets in proportion to the capital, and the mere arrangement for the division of profits *inter se* during the continuance of the partnership would

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have no direct bearing on the division of the capital as distinguished from profits earned up to the time of the dissolution after the dissolution of the company.

But this case is governed by an Act of Parliament, and the Act of Parliament says that the property of the company shall be applied in satisfaction of its liabilities *pari passu*; that is, on winding-up, and subject thereto, the property shall, unless it shall be otherwise provided by the articles of the company, be distributed among the members according to their rights and interests in the company. Therefore the Act of Parliament is subject to regulations of the company; and what it means is, that the regulations of the company are to have effect given to them, if there are any regulations bearing upon the subject. It appears to me, therefore, that there being regulations in this case, I have nothing whatever to do, under the Act of Parliament, but to look at those regulations and construe them.

[His Lordship then stated the effect of the 17th, 18th, 19th, and 20th articles of association, which embodied the provisions contained in the memorandum of association.]

Now we come to the 21st article: "Subject only to the differences above mentioned" (which is the difference in dividing the profits), the preferred and deferred shares shall rank equally in the company, and except as aforesaid there shall be no difference between the *status* and liability to the debts and engagements of the company of the holder of a preferred share, and the *status* and liability to such debts and engagements of the holder of a deferred share."

That is very plain English. "*Status*" means the position of the share or shareholder. His rights, and really his liabilities, though liabilities are mentioned also, are the same, subject only to certain rights as to the division of profits, that is, whilst profits are earned; because you find that the dissolution of the company is contemplated by the 146th, 147th, and 148th articles of association. It therefore comes to this, that, under the regulations of this company, as long as profits are earned the profits go to the preferred shareholders until the amount of all arrears is made up, and then the balance to the deferred shareholders. But, with the exception of those provisions as to the division of profits, the

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position of all the shareholders is exactly the same. The result, therefore, is, that when a dissolution arrives, and no more profits are earned, all these shareholders stand in exactly the same position, and are entitled to the capital *pro ratâ*.

Of course some observations were made on the possible hardship of such a result; but the answer is simple. People who enter into these partnerships under articles of association, that is, articles of partnership, must be taken to have read them, and must be taken to have understood them, and if they are to be taken to have read them, and to have understood them, which they ought to do before entering into these contracts, they cannot complain if the contract is afterwards carried out. That appears to me a conclusive answer to any notion of hardship. Whether it is conclusive in fact or not is a matter upon which men who have experience in the world may have different opinions; but I must hold it to be conclusive in law.

Therefore I decide that in allotting, as these people have allotted, a small proportion only to the deferred shareholders, which has been done with their consent, they have given them less than they are entitled to, and the Plaintiff has no ground of complaint.

Solicitors: *E. Beall; Cunliffe & Beaumont.*

WILLIAMS *v.* JORDAN.

M. R.
1877
July 12.

[1876 W. 191.]

Agreement for Lease—Offer and Acceptance—Lessor not named—Specific Performance.

An offer in writing to take a lease of a theatre, signed by the intending lessees and attested by the lessor's agent, but not naming the lessor and only addressed to him as "Sir," followed by an acceptance in writing by the agent, addressed to and received by the intending lessees, but likewise not naming the lessor, which letter was not signed by them nor referred to in any other writing:—

Held, not to be an agreement in writing within the *Statute of Frauds* so as to entitle the lessor to have the same specifically performed.

Statement.

ON the 29th of February, 1876, the Defendants, *Robert Jordan*, *Reuben J. Jordan*, and *Albert J. Davis*, signed the following letter

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in the presence of a Mr. *Sydenham Watson*, who alleged himself to be the agent of the Plaintiff, to sell or let the *Bijou Theatre* in *Archer Street, Bayswater*, of which the Plaintiff was the alleged owner:—

"Sir,—I hereby agree to rent the *Bijou Theatre, Bayswater*, together with all appurtenances belonging, on a 7, 14, or 21 years lease, to be computed from Lady Day next, and to contain the usual covenants, at an annual rent of seven hundred and fifty pounds (£750), and to sign an ordinary lease. It is understood that I may be allowed to take formal possession of the said premises as soon as this offer is accepted, notwithstanding the lease may not be signed.

"*Robert Jordan*,
"*Reuben J. Jordan*,
"*Albert J. Davis*.

"Witness:
"*Sydenham J. C. Watson*,
"*Harlesdon*."

This letter was given to *Watson* for delivery to the Plaintiff.

On the 5th of March, 1876, the Defendants received the following letter from Mr. *Sydenham Watson*:—

"Messrs. *R. Jordan, R. J. Jordan*, and *Albert J. Davis*.

"Dear Sirs, "54, *Russell Square*, W.C.

"*Re Victoria Hall Bijou Theatre*, &c.

"I am happy to inform you that your offer of the 29th ult., to rent these premises upon lease of 7, 14, or 21 years, at £750*l.* per annum, is accepted by the owner of the property, whose solicitor will shortly communicate with you regarding the lease. I may mention that I have seen the surveyor and architect, who certifies that the premises are perfectly safe, being most substantially built, and admirably adapted in every way for the purpose required.

"I remain, Dear Sirs,
"Yours truly,
"*Sydenham Watson*."

The Defendants did not append their signatures to this letter nor to any other document referring to it.

The Defendants subsequently refused to perform the contract, alleging that they had withdrawn their offer before the letter of the

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5th of March, 1876, was written or sent to them, upon which the Plaintiff brought his action for specific performance.

The Defendants, by their defence, denied that the letters constituted a contract or agreement within the provisions of the *Statute of Frauds*.

Argument.

Roxburgh, Q.C., and *Brett*, for the Plaintiff.

Chitty, Q.C., and *Sidney Woolf*, for the Defendants:—

According to Mr. *Dart* (1), it appears to be now clearly settled that, in order to satisfy the statute, both parties should be specified either nominally or by a sufficient description. Here the letters do not shew who the intended lessor is, and there is no other document which is sufficiently connected with the offer to cure the defect: *Warner* v. *Willington* (2); *Boyce* v. *Green* (3); *Potter* v. *Duffield* (4).

[They referred also to *Rossiter* v. *Miller* (5) and *Catling* v. *King* (6).]

Roxburgh, in reply:—

There is an offer to take a lease, signed by the parties to be charged, and an acceptance of that offer by the agent of the Plaintiff by the description or reference of the owners. In *Potter* v. *Duffield* (7) your Lordship observed: "The statute will be satisfied if the parties are sufficiently described, so that their identity cannot be fairly disputed," which is the case here.

Judgment.

JESSEL, M.R.:—

I must most reluctantly allow the objection, but I think that I am bound to do so. First of all, the letter containing the offer was not addressed to anybody. It begins "Sir," but who "Sir" was does not appear from the letter. It is signed by the Defendants, and that is all. There was a letter of acceptance sent to and received by the Defendants, but that letter is not signed by

(1) V. & P. 5th Ed. p. 217.
(2) 3 Drew. 523.
(3) Batty, 608.
(4) Law Rep. 18 Eq. 4.
(5) 5 Ch. D. 648.
(6) Ibid. 660.
(7) Law Rep. 18 Eq. 4, 7.

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the Defendants, nor is it referred to in any subsequent letter or document bearing their signature. Now, as I understand the *Statute of Frauds*, or rather the decisions on that statute, there must be a memorandum or note in writing of some agreement. But the letter of the 29th of February is not an agreement; it is an offer by the Defendants to somebody, I cannot tell who. The letter of acceptance does not shew who that somebody is, for there is nothing in it to incorporate it with the original offer, and no document referring to it of subsequent date with the Defendants' signature. In the case of *Warner* v. *Willington* (1), just as in this case, the lessor's name was not signed, and Vice-Chancellor *Kindersley* held that because the name of the lessor did not appear the memorandum was not sufficient to maintain an action or bill for specific performance. He said: "But though this is the general rule, there is this exception, that if it can be ascertained who is the vendor or intended lessor from some other document which is sufficiently connected with the memorandum by clear reference" (of course he meant some other document previously existing) "that will cure the defect of the memorandum." There is, I have already said, no such document. I am of opinion that I am bound by *Warner* v. *Willington* to give effect to this objection, and there must be judgment for the Defendants, with costs.

Solicitors for Plaintiff: *Thomas Beard & Son.*
Solicitor for Defendants: *Conrad J. Davis.*

(1) 3 Drew. 523, 530.

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HAWLEY *v.* STEELE.

M. R.
1877
July 13.

[1877 H. 273.]

Military Purposes, Land held for—5 & 6 *Vict. c.* 94—*Defence Acts* (23 & 24 *Vict. c.* 112; 36 & 37 *Vict. c.* 72)—*Rifle Practice—Action against General in Command of Troops—Nuisance—Injunction—Jurisdiction—Parties.*

Semble, where, under the powers of 5 & 6 Vict. c. 94, and the subsequent Defence Acts, land has been vested in the Secretary of State for War upon trust for the Crown, such land, and every part thereof, may be used for all reasonable *bonâ fide* military purposes that the Government may require, and such user cannot be controlled by the Court.

In an action to restrain the Defendant, a General in Her Majesty's Army, and the officers under his command, from causing or permitting rifle practice on a common (forming part of the land thus vested) in close proximity to the Plaintiff's house, which, as he alleged, was a serious nuisance and occasioned damage to his property—on motion for injunction:—

Held, that to such an action, if sustainable, the Secretary of State for War was a necessary party:

Held, also, that the allegations in the statement of claim being insufficient, no interlocutory injunction could be granted.

Statement.

THE Plaintiff was the resident owner in fee of a dwelling-house, garden, and land situate at *Ash*, in the county of *Surrey*, and looking upon *Ash Common;* his statement of claim alleged that *Ash Common* was a large tract of land belonging to the Crown, and was in the use and occupation of the War Department, and was so used and occupied for divers purposes connected with the troops at *Aldershot* camp, under the direction and control of the Defendant, who was a Lieutenant-General in Her Majesty's Army, and in command of the troops at *Aldershot.*

That in a remote corner of *Ash Common*, and within 600 yards from the Plaintiff's house, there had recently been erected, under the orders and directions of the Defendant, a butt, against which had been set up a long row of targets facing the Plaintiff's house for the rifle practice of the troops at *Aldershot*, and the firing parties were stationed between the Plaintiff's house and the targets, and at distances of from 100 to 200 yards from the front windows; that the firing often commenced before six in the morning, the noise of which was, as the Plaintiff alleged, a very serious nuisance and injury to the health and comfort of himself and his

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family, and a great injury to his house and grounds, and depreciated the value thereof, and rendered the same much less commodious and convenient as a residence; that the Plaintiff had already suffered serious damage, and had remonstrated with the Defendant against the continuance of the said nuisance, but he refused to discontinue the same; that the acts complained of were carried on under the orders and directions of the Defendant, and with his permission, as the person having the control of *Ash Common;* that the orders under which the Defendant acted as commander of the troops at *Aldershot* did not instruct him to cause, direct, or permit the troops to fire so as to cause a nuisance, and he had no authority whatever for doing so.

The Plaintiff claimed that the Defendant and the officers of the army under his orders might be restrained by injunction from causing rifle practice and firing to take place on *Ash Common,* and from permitting the common to be used for rifle practice and firing, or for the assemblage of crowds or numbers of soldiers so as to be a nuisance to the Plaintiff, his family, servants, and premises. The Plaintiff also claimed for damages for the nuisance and injury so sustained by himself and his family.

The case now came before the Court on a motion on behalf of the Plaintiff for an injunction to restrain the alleged wrongful acts of the Defendant, and affidavits were filed in support of the Plaintiff's allegations, which were uncontradicted by the Defendant.

Argument.

Waller, Q.C., and *Bunting*, for the Plaintiff, in support of the motion:—

The Plaintiff's evidence clearly establishes a case of nuisance, which would under ordinary circumstances entitle him to an injunction. But it may be said that as the land was purchased by the Crown for military purposes, and as the Defendant is an officer in command responsible to his superiors, no such action will lie.

Ash Common was purchased under the provisions of the Act 5 & 6 Vict. c. 94, which was passed to consolidate and amend the laws relating to the services of the Ordnance Department, and for the vesting and purchase of lands for these services, and for the

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defence and security of the realm. By sects. 5 and 6 of that Act, lands, building, and forts already set apart, or which thereafter should be taken by the Crown for the use of the Ordnance Department, or for the defence and security of the realm, were to be vested in the principal officers of Her Majesty's Ordnance, and by the 9th section the said officers are empowered to contract for and take such buildings or lands on behalf of Her Majesty. By the *Ordnance Board Transfer Act*, 1855 (18 & 19 Vict. c. 117), the powers thus vested in the principal officers of the Ordnance were to be transferred to Her Majesty's Secretary of State for the War Department, to whom all lands and buildings held under the former Act were also to be transferred. By the *Defence Act*, 1860 (23 & 24 Vict. c. 112), s. 29, the Secretary of State for the War Department was enabled to avail himself of the provisions of the *Lands Clauses Act* for the purchase of lands, and *Ash Common* is now vested in him as trustee for Her Majesty and her successors.

There is, we submit, nothing in any of the Acts referred to nor in the *Defence Act*, 1873 (36 & 37 Vict. c. 72), to authorize anything to be done which would previously have been illegal. These Acts only authorized the acquisition of land for military purposes, but no officer can thereby claim any right to commit a nuisance thereon. Nor can the Defendant's case be supported by reference to the *Military Manœuvres Act*, 1872 (35 & 36 Vict. c. 64), for the provisions contained in it as to compensation for damages which are not contained in the Defence Acts, shew that special parliamentary powers were necessary to enable military officers to affect private property on which they might trespass. Now, nuisance must be for this purpose on the same footing as trespass, and there is nothing to authorize the constant firing of volleys close to a private residence which, without parliamentary sanction, amounts to a nuisance.

It may be said that as the Defendant is an officer of the Queen no action will lie, and that the Plaintiff's proper remedy is by a petition of right. But in a case of tort no petition of right will lie: *Tobin* v. *The Queen* (1); *Kirk* v. *The Queen* (2). In *Viscount Canterbury* v. *Attorney-General* (3) it was held that there could be

(1) 14 C. B. (N.S.) 505. (2) Law Rep. 14 Eq. 558.
(3) 1 Ph. 306.

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no petition of right to recover compensation from the Crown for damage to the property of individuals occasioned by the negligence of servants of the Crown. Again, it may be urged on behalf of the Defendant that, assuming the Plaintiff is entitled to an injunction, the present Defendant is not the proper person to be made Defendant as he is subordinate to the Secretary of State for War, but in a case of actionable nuisance the action may be properly brought against the man by whose immediate orders the act complained of was done. In *Nicholson* v. *Mouncey* (1) it was held that the captain of a sloop of war was not liable for damages in running down a vessel, as the damage appeared to have been done during the watch of the lieutenant, who was upon deck, and who had the actual direction and management of steering and navigating the vessel.

The Defendant, as a servant of the Crown, is himself responsible for a wrongful act, though done by the authority of the Crown. This was clearly laid down in *Feather* v. *The Queen* (2), where *Cockburn*, L.C.J., observed: "Let it not be supposed that a subject sustaining a legal wrong at the hands of a minister of the Crown is without a remedy. As the sovereign cannot authorize wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown." If, however, your Lordship should be of opinion that the Secretary of State for War is a necessary party, we ask for leave to amend the writ and statement of claim accordingly. In the meantime we submit that the Plaintiff is entitled to an interlocutory injunction. In *Banister* v. *Bigge* (3) an injunction was granted to prevent the user of a volunteer rifle range until it had been rendered free from danger.

Gorst, Q.C., and *Rigby* (Sir *J. Holker*, A.G., with them), for the Defendant, were not called upon.

Judgment.

JESSEL, M.R.:—

There are so many reasons why I cannot grant an injunction in this case, that I do not think it necessary now to call upon the

(1) 15 East, 384. (2) 6 B. & S. 257, 296.
(3) 34 Beav. 287.

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counsel for the Defendant. When the case comes for trial, if it ever does, it will probably be necessary to hear them. In saying that I am assuming that the statement of claim will be largely amended.

Now, it is rather because I never desire to decide a case on mere technicalities alone, that I shall state some of the points that occur to me as being in the Plaintiff's way, many of which are arguable, and give him an opportunity of removing them, so that the real question between himself and the Government—for they are the real parties to the suit—may be tried and decided at the trial of the action.

In the first place the Plaintiff alleges a case, and his affidavits being uncontradicted, prove a case, which in my opinion would entitle him to an injunction against the Defendant, supposing the Defendant was the absolute owner in fee simple of the land, and supposing the troops who have caused the noise and vibration which has been occasioned by their firing at the targets were a mob or an assembly of individuals, not subject to military discipline. I take it to be clear that no man is entitled to use his land by allowing others to come upon it and make a noise which is really intolerable to his neighbours, or which, to put it in legal language, materially interferes with their ordinary comfort and use of their dwelling-houses; and therefore, if Sir *Thomas Steele* had been the owner of this land, and if the persons who caused that noise and vibration had not been troops of the Government, I should have had no hesitation in granting the injunction. But that would assume also that there had been some trifling amendment made in the statement of claim to which I will refer.

It appears on the statement of claim that Sir *T. Steele* is not the owner of the land at all, and it also appears upon the evidence that he is merely the Lieutenant-General in Her Majesty's Army who happens to be in command of the troops at *Aldershot*. Then there is no allegation of that which is absolutely essential, namely, of a threat to continue the nuisance.

Then it is not stated actually that the *Ash Common* belongs to the Crown. It appears it does not, and it is vested in the Secretary of State for War under various Acts of Parliament as a corporation in trust for the Crown, and the rules which apply

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to that case of ownership are not the same as those which apply to the pure ownership of the Crown. You can sue the legal owner when a corporation, although he is a trustee for somebody else, for misuser of the land, and I have no doubt that was one of the reasons why the new corporation was created. He can both sue and be sued. To what extent he can be sued when the direct rights of the Crown come into question is a point I am not now deciding, but he is a necessary party to the action.

Then I cannot find out from the statement of claim, or from the evidence, that the Defendant, Sir *T. Steele*, had any real control over the land at all. It is not only not alleged that he intended to continue it, but so far as I can find out, he cannot continue it. He only remains in command so long as the Secretary of State or the General Commanding in Chief chooses, and no longer, and any one who happens to be in command may have to do this very same thing. So the person who has done the act is not the person who threatens to continue the act, and even assuming that Sir *Thomas Steele* could be properly sued for what has been done, he could not be sued for an injunction, because there has been no threat to continue the act, nor does he threaten to continue it in the present case. That is quite a sufficient answer, in my opinion, to this application for an injunction to restrain the Defendant and the officers of the army under his orders. If you are asking for an injunction, you must have as the Defendant the man who, in future, can authorize or permit the continuance of the nuisance, and he is not here. So far, therefore, upon what I will call technicalities, although I agree there are substantial grounds for an injunction, I am quite unable to accede to the present application.

But there remains behind a very substantial question indeed, and it is whether these are rightful or wrongful acts, whether wrongful in the case of an individual, and rightful in the case of the military authorities. That must depend, as it appears to me at present, although I have not heard the counsel for the Defendant, upon the construction of the various Acts of Parliament which authorized originally the officers of Ordnance, but now the Secretary of State for War, to acquire the right to lands.

Under various Acts of Parliament the officers of the Ordnance Department and their successor the Secretary of State for War

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were authorized to acquire and, as I understand it, to use land in this kingdom for the purpose of securing the military defence of the country, chiefly, no doubt, for the defence of the realm. Then there was the *Defence Act*, 1860, which authorized the War Department to acquire land for the purpose of fortresses, and for the use of that land for the purpose of fortresses. That, I suppose, would be the meaning of such an Act of Parliament. If that is so, you cannot bring an action against anybody who should so use the land which has been authorized to be acquired, and therefore, if I should be of opinion that the Acts of Parliament authorize the officers of the Ordnance Department and their successor the Secretary of State for War to acquire these lands for the purpose of general instruction, and that the use made of them was a reasonable use, it seems to me no action would lie against the individual who, under the authority of the executive Government, made such a use of the land. That seems to me the general proposition.

Now, I quite agree that no individual can plead the command of the Crown if he does a wrongful act in the shape of a tort. For instance, if the officer in command at *Aldershot* told his men, not being sufficiently provisioned, to attack the houses in the neighbourhood, and to feed themselves from the larders of the inhabitants, it is quite plain that that order would be no justification to the men, and they would be liable to indictments or other criminal proceedings the same as any other person. The real question is, whether the Legislature has authorized the act to be done. That being so, the Acts, to which my attention has been drawn, look very much like authority for that purpose. I am not going finally to decide the question; it is a question that will be very much considered at the trial, when I shall know a good deal more about the Acts of Parliament, and also something more (although I do not see that it is disputed) as to the reasonableness of the acts done, having regard to the purpose for which this land has been acquired.

The first Act to which I have been referred, the *Consolidation Act*, relating to the services of the Ordnance Department, the 5 & 6 Vict. c. 94, is not perhaps worded in such a way as to be beyond argument as to the meaning. I think the general meaning

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is pretty plain. The 5th section enacts with a great deal of verbiage, that "all messuages, castles, forts, lands, &c., which have been heretofore set apart for the use and service . . . . or for military defences, or which have been taken by any person in trust for Her Majesty or her royal predecessors, or her or their heirs or successors, for the use and service of the said departments, or for the defence and security of the realm, either in fee, or for any life or lives, or otherwise howsoever, and all erections and buildings, which now are, or which shall or may hereafter be erected and built thereon, together with the rights, members, easements, and appurtenances to the same respectively belonging, shall be, and become, and continue vested in the principal officers of Her Majesty's Ordnance"—now the Secretary of State for War.

Then the 6th section says that the same thing shall apply to land taken in future for the same purpose which is to be vested in the same manner. [His Lordship then referred to sects. 9 and 10.] Putting all these sections together, they seem to me to amount to this, authority to the officers of the departments to take, that is, to purchase or acquire, and to use the land so purchased or acquired, including lands then vested in them, "for the purposes of the defence of the realm"—these are very large words—"or for military defences, or for the services of the departments," substantially for all reasonable military purposes. That is the effect of the sections, as it appears to me, although I am not now intending finally to decide upon them; upon the reading of them I mean. Therefore we have this as the general effect of the Acts of Parliament: lands authorized to be bought, vested in a trustee for the Crown, to be used for the military purposes of the realm.

Now, what does that mean? That must mean to be used for reasonable purposes having regard to the nature of the requirements of the military departments of the Government; and if that is so, it appears to me that, except in the case of an outrageous departure from all reasonable use, it is not for a Court of Justice to say what is the reasonable use of land for military requirements, but it is for the departments to say that such land is wanted as a camp for exercise and instruction, such other land is wanted for a fortress, and such other land is wanted for an arsenal. In other words, I think the discretion is vested in the executive Govern-

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ment having authority over military matters to determine for which of these various military purposes for which land may fairly be required the particular land in question is to be appropriated. It is not for the Judge to say that they have made a bad selection, and that they ought to have taken *Blackacre* for a camp instead of a fort, that they ought to have taken *Whiteacre* for an arsenal instead of a camp, or that they ought to have taken *Greenacre* for a camp instead of a fortress. It appears to me that that would be an invasion of the authority of the military department by the Judge if he interfered with such matters, and therefore, if I find that the military authorities of the country had selected this land as being a proper place for the camp of instruction, I should say that it is for those authorities finally to determine that question, and that all I had to look to would be whether they were using the land in any way except in a reasonable way as a camp of instruction; and here again the Judge must be very careful. As I said before, if it was an outrageous use, I have no doubt the Court would interfere. I can imagine such a use of land under the name of a camp of instruction, that it would be so entirely opposite to a camp of instruction that the Court would say at once it was a mere subterfuge, and not a *bonâ fide* use of the land, but the moment the Court is satisfied that it is a *bonâ fide* use of the land for the purposes of a camp of instruction it appears to me that the Court's function stops, that it has no right to say that the tents shall be pitched on another piece of land, or that targets are to occupy a different piece of land. That is for the military authorities to decide, and that would be their province and not the province of the Court.

Then it follows from all I have said, without any further statutory enactment, that the power so conferred on the military authorities was a legal right to the use of the land for that purpose, although such a use would, without the authority of Parliament, have been illegal. If that is so, it is impossible to maintain an action for nuisance.

Now, independently of what I said as to the general meaning of the statute, I have referred to the particular statute which recognises the particular use to be made of this particular land; it seems this land was bought in 1855, and was then devoted, with some

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other land in the neighbourhood of *Aldershot*, to the purposes of a military camp, and by an Act of Parliament, being 19 & 20 Vict. c. 66, the user was recognised as being a proper user, and authority was taken to close the roads going over this and the adjoining lands for the purpose of making that user more effectual. That is a very strong recognition of the propriety of the decision of the military authorities in devoting this particular piece of land to the purposes of a military camp. [His Lordship then read the preamble to the Act.]

There is a legislative recognition that the formation of a camp for the instruction and training of troops in the science of war and their duties relating thereto at that part is not only proper, not only useful, as it is called there, but it is useful and so much for the public service that you are entitled to stop up public roads across the common, because the land was intended to be used for the public service. It appears to me, therefore, that here you have a legislative recognition of the rightfulness of the discretion exercised by the War Department, in preferring this land for the purpose; and without intending, as I said before, finally to decide the question, it seems to me it would be a very strange exercise of authority for me to hold that such a user of the land so authorized by the Legislature is a common nuisance which ought to be restrained by injunction.

Solicitors for Plaintiff: *Walker & Battiscombe.*

Solicitors for Defendant: *Hare & Fell*, for *Solicitor to the Treasury.*

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In re GORDON.
ROBERTS *v.* GORDON.

[1877 G. 61.]

M. R.
1877
July 27.

Will—Trust for Sale of Real Estate—Legal Estate—Renunciation of Probate by Trustee—Election to take as Real Estate.

Devise and bequest of freehold and copyhold land and personal estate to *A.* and *B.*, upon trust as to the land for sale, and as to the personalty to realize the same, and to stand possessed of the proceeds upon trust for *C. M.*, who was his heir-at-law, absolutely. *A.* predeceased the testator; *B.* renounced probate, and died three years afterwards, not having acted as trustee, though he did not disclaim the trusts, and letters of administration with the will annexed were granted to *C. M.* From and after the testator's death *C. M.*, through his agent, received the rent of the land, but did not exercise any other act of ownership. No one was admitted tenant of the copyhold. The land was let from year to year, and there was one change of tenancy effected by the agent. On the death of *C. M.*, who survived the testator nearly nine years, the question arose whether the land was to be treated as real estate:—

Held, that on *B.* renouncing probate, the legal estate devolved on *C. M.*, and that, whether the legal estate was outstanding or not, *C. M.* must be taken to have elected to take the land as real estate.

Statement.

THE testator, *Cosmo Gordon* the elder, by his will, dated the 25th of September, 1851, after a specific gift to his wife, gave all his freehold and copyhold estate, and all his personal estate not before bequeathed, to Sir *Edmund Antrobus* and *Alexander Trotter*, their heirs, executors, and administrators, upon trust, as to the real estate, that the trustees or trustee should at such time or times after his death as they or he should think fit, sell the same, and he declared that the moneys to arise from such sale should sink into and form part of his personal estate, and that his real estate, and so much thereof as should from time to time remain unsold, should be considered as personal estate, and the rents thereof until sale be applied in like manner as the dividends, interest, and annual proceeds of the securities upon which the money to arise by the sale thereof was thereinafter directed to be invested would be payable and applicable in case the real estate were actually sold; and, as to the personal estate, the trustees were to hold it

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upon trust to realize the same; and the testator declared that the trustees should stand possessed of the proceeds of the sale of the real estate and of the personal estate upon trust, after payment of his debts and funeral and testamentary expenses, for his wife for life, and after her decease, upon trust for his son, *Cosmo Gordon*, absolutely, but if he should die in the testator's lifetime, then over; and he appointed Sir *Edmund Antrobus* and *Alexander Trotter* executors of his will.

The testator's wife and the said *Alexander Trotter* both died in his lifetime. The testator died on the 7th of March, 1867.

The surviving trustee, Sir *Edmund Antrobus*, renounced probate of the will, and did not in any way act as trustee, but did not execute a disclaimer of the trusts. On the 2nd of May, 1867, letters of administration with the testator's will annexed were granted to the said *Cosmo Gordon*, who partly administered his father's estate. In 1870 Sir *E. Antrobus* died.

The testator was seised of a farm at *Gillingham*, partly freehold and partly copyhold. After his death *Cosmo Gordon* received the rents through an agent. He never took any steps to be admitted tenant of the copyholds, and no one had since been admitted thereto. He did not grant any lease of the property, which was let on a yearly tenancy; on the death of the tenant the agent allowed his widow to take possession of the farm. *Cosmo Gordon* resided in another county, and never visited the farm.

There was some correspondence tending to shew that he was regarded as the owner of the farm.

On the 18th of January, 1876, nearly nine years after the decease of his father, *Cosmo Gordon* died intestate, whereupon the Plaintiff, his half-sister and his sole next of kin, took out administration to his estate, and also took administration with the will annexed, to the testator's estate left unadministered.

The question in the case was whether the farm was to be treated as converted and as personal estate, or whether *Cosmo Gordon* was to be taken to have elected to take it as real estate. The Plaintiff, as the personal representative of *Cosmo Gordon*, alleged that he had not elected to take the farm as real estate, and claimed to have it sold and the proceeds paid to her; the Defendant, his heir-at-law and customary heir, claimed it as real estate.

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1877

In re GORDON. ROBERTS v. GORDON.

Davey, Q.C., and *V. Hawkins*, for the Plaintiff:—

Argument.

The Plaintiff in this case, as the personal representative of *Cosmo Gordon*, is entitled to the proceeds of the sale of the farm at *Gillingham*, unless it can be shewn that *Cosmo Gordon* elected to take it as real estate. The circumstances here are insufficient to support such a presumption. First, the legal estate is still outstanding, as the renunciation of probate by Sir *Edmund Antrobus* is not enough without a disclaimer of the trusts of the will. Besides, there is no evidence of any act done by *Cosmo Gordon* which would shew an intention of treating the farm as real estate. In *Crabtree* v. *Bramble* (1), which may be cited as shewing an intention to take land devised in trust for sale as real estate, there were circumstances on which the Court relied as shewing such intention. Mere lapse of time will not alter the rights of the parties claiming, in the absence of some act of ownership. It is for those who say the land has been reconverted to shew the acts on which they rely. The principles on which the Court presumes an election to take the land as realty were considered in *Harcourt* v. *Seymour* (2); *Mutlow* v. *Bigg* (3); *Dixon* v. *Gayfere* (4); *Davies* v. *Ashford* (5). There is no case in which such a presumption has been inferred as to copyholds where no one has been admitted, nor is there any authority for holding that the mere lapse of nine years is sufficient without any act or circumstance to raise a presumption in favour of the Defendant's contention. In *Brown* v. *Brown* (6) three years and a half was held insufficient to support a case of alleged reconversion.

Chitty, Q.C., and *Dunning*, for the Defendant, were not called on.

JESSEL, M.R.:—

Judgment.

This point has, as it appears to me, been settled years ago. [His Lordship then stated the facts of the case down to the death of Sir *Edmund Antrobus*.]

The first question that I have to consider, though I should have come to the same conclusion as I have on the other parts of the

(1) 3 Atk. 680.
(2) 2 Sim. (N.S.) 12.
(3) 1 Ch. D. 385.
(4) 17 Beav. 433.
(5) 15 Sim. 42.
(6) 33 Beav. 399.

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case if my opinion had been the other way, is whether or not the legal estate remained in Sir *Edmund Antrobus*, or whether it passed to the heir-at-law, *Cosmo Gordon*. I think there was sufficient evidence of disclaimer. My reasons for saying so are these. In the first place we have this, that he never acted; that is a very strong circumstance, a man lives three years and does not act at all. It is a strong proof that he does not intend to act. Of course it is not in itself conclusive, but it is evidence that he does not intend to act. But, when we have the trusts of the will and the personal estate combined, the real estate to be sold and made a mixed fund, and to be applied with the personal estate in paying debts, legacies, and funeral expenses, and we find the same people appointed executors, and the gift of the personal estate is not to him except the direction to get it in and divide it, and then we find the trustee renouncing, it is conclusive evidence; he renounces execution of the will as to the personal estate, he cannot carry out the trusts as to the payment of the debts and funeral and testamentary expenses, as that is the executor's business, and the person who takes out the administration must perform it. He cannot, as I understand it, get rid of a part of his trust in this way. In other words, it is evident that he intends to have nothing to do with the will, that he intends, in fact, to disclaim all the trusts; that is material evidence, and therefore I think the legal estate is in *Cosmo Gordon*.

If, however, I thought the bare legal estate was still in Sir *Edmund Antrobus*, the conclusion I should arrive at as to the election would have been the same.

What happens next? *Cosmo Gordon* the younger took possession of all the real and personal estate, that is, he by his agent received the rents, and died on the 18th of January, 1876, intestate; for nearly nine years his agent received the rents in the regular way, accounting to him for the balance after making the necessary payments. There seems to have been one change of tenancy. The tenant died, and the widow was let into possession by the agent. Nothing more seems to have been done. There was some correspondence about the estate, a correspondence which only shews, as the fact was, that *Cosmo Gordon* was treated as the owner.

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Now, under those circumstances, has he or not got the estate home, and shewn an intention of keeping it? I think he has. Upon this point I will read a few words from an old case which was frequently referred to in the course of the argument, *Crabtree* v. *Bramble* (1). The case is remarkable for this, that the decision was not only that a certain act done as regards real estate reconverted it, but that it reconverted another estate subject to the same uses, the presumption being that if you intend to reconvert one estate you intend to reconvert all. Lord *Hardwicke* says (2): "The second question is, as to the election of *Elizabeth* the daughter, whether there be any evidence in the case of her electing to keep this as land? It must be allowed equity follows the contracts of parties, in order to preserve their intent, by carrying it into execution, and depends on this principle, that what has been agreed to be done for valuable consideration is considered as done, and holds in every case except in dower; and therefore where money is to be laid out in land, there the Court will make it have the property of land; the same rule of lands to be converted into money." In that case there were two successive tenants for life—*Richard Crabtree*, the father, who died in 1701, and the mother, who died in 1742. *Elizabeth*, who was entitled in remainder, did not survive her mother quite two years. There the legal estate was undoubtedly outstanding in trustees. Lord *Hardwicke* observes: "She, on the mother's death, entered on the land, and from that time continued in possession for two years, received the rents, made no application to trustees to sell, nor brought a bill against them to sell, though she had a right to apply to them to sell, and, as *cestui que trust*, might have contracted for selling, and bound the trustees."

Every word of that applies to *Cosmo Gordon*, assuming the legal estate to be in the trustees, with this addition, that here it is nine years instead of two. Lord *Hardwicke* then refers to an additional point which does not occur in this case: "But there is still something more in the case; she made a lease in 1729 of the lands, reserving a rent to her and her heirs, and likewise in 1739, with the same reservation. This hath been insisted to be a

(1) 3 Atk. 680. (2) 3 Atk. 687, 688.

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further act to shew she approved of its continuing as land"—he uses the words "further act" to shew, in Lord *Hardwicke's* opinion, that what she did in entering into possession, receiving the rents for a period of two years, and making no application to the trustees to sell, was at least an act—"It was objected, the leases were made in the lifetime of the mother, who had her life in the estate; but the question is not, whether she had a right to lease it out, but whether this does not amount to an approbation of its continuing as real estate." Then he goes on to say, "Had she any right to make an election at twenty-one, after the death of the father, as she was the only child of the marriage? I am of opinion that she had a right to elect even during the mother's life, and that she might have come into this Court to compel the trustees to sell this reversion for her benefit, even in the mother's lifetime; and though she had this right, yet instead of doing this she makes leases of the lands, reserving rent to her, her heirs and assigns. Can there be a stronger evidence to shew her intention to continue it as real estate, than that she had bound her heirs to make good this lease? It has been said the trustees in point of law had a right to receive the rents, and to be sure they had; and yet she enters against their possession, and grants leases of the lands; and it was a very material observation of the Defendant's counsel with regard to the heir's being liable to an action on the part of the lessee."

It appears to me that Lord *Hardwicke* considered all that as being an additional act strongly confirmatory, but made an additional act to the act of taking possession and receiving the rents. Strictly speaking, she had no right to the possession, because the trustees had it; she had no right to receive the rents, because the trustees had a right to receive them. In Lord *Hardwicke's* opinion what she did take, independently of that further act, she would have been entitled to take, though he did lay hold of the further act, which made it more applicable to confirm the conclusion he came to.

Now, of course in this case there are no acts binding the heir by covenant, because the common term "from year to year" did not bind the heir. But there is this observation to be made, and

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in that respect it appears to me to come within the principle of *Crabtree* v. *Bramble* (1), as he did let to a new tenant from year to year, he would have been liable to an action by the tenant if the trustees had afterwards exercised the trust for sale, supposing they had sold the estate and that tenant had been evicted. I am not prepared, however, to say that my opinion would have been different if there had been no change of tenancy during the nine years.

Then, in *Wheldale* v. *Partridge* (2), Lord *Eldon* says this: "The money being once clearly and plainly impressed with real uses, as land, and one of those uses being for the benefit of the heir, the impression will remain for his benefit; and to put an end to that impression, it must be shewn, either, that the money was in the possession of a person who had in himself both the heirs and executors, or he must do some act to denote a change of his intention as to the devolution of the property upon either." Then he says: "And it is not correct to say, the Court does not interpose between volunteers, if they give to the executor that money, which the instrument has given to the heir. The case of *Pulteney* v. *Lord Darlington* (3), in the House of Lords, a case much agitated, and upon which all the great lawyers were consulted, went no farther than this; that, if the property was at home, in the possession of the person, under whom they claimed as heir and executor, the heir could not take it; but, if it stood out in a third person, he might; and the question in that cause was, not upon the equity between the heir and executor, but, whether the money was at home." Then he says: "In the older cases there is no doubt, that if a real use was once impressed upon the property, it went through all the limitations, till it was at home in the pocket of the party, or any act done by him, to take off that impression, so as to entitle the executor. The slightest act would do." I have read down to those words to shew that it is something very slight, and there is reason for saying so. There is no equity as regards the personal representative, there was no human being who could call on *Cosmo Gordon* to sell the estate or to keep it. And, of course, when he died, it being, as it was, land, you must,

(1) 3 Atk. 680. (2) 8 Ves. 235.
(3) 1 Bro. C. C. 223; 7 Bro. P. C. 530.

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in order to raise up the equity in favour of the person claiming it as being something other than it really was, shew some contract binding on the estate.

The cases of *Harcourt* v. *Seymour* (1) and *Dixon* v. *Gayfere* (2) have also been referred to. All that Lord *Romilly* said that was pertinent to the question was, that a slight act will do, following what Lord *Eldon* said with regard to the converse case. In *Harcourt* v. *Seymour* (3) the Vice-Chancellor, afterwards Lord *Cranworth*, says this: "I take the law upon this case to be perfectly clear. Where, by a settlement, land has been agreed to be converted into money, or money to be converted into land, a character is imposed upon it, until somebody entitled to take it in either form chooses to elect that, instead of its being converted into money, or instead of its being converted into land, it shall remain in the form in which it is actually found. There can be no doubt that that is the law; and the only question in each particular case is, whether there have been acts sufficient to enable the Court to say that the party has so determined." Then, after commenting on the argument of counsel, who contended that there must be the intention to convert, he says: "I do not, however, think that that is the correct view of the law. It is quite sufficient if the Court sees that the party means it to be taken in the state in which it actually is. Whether he did or not know that, but for some election by him, it would be turned into land, is quite immaterial."

I think, myself, that in this case, as I said before, there are quite sufficient acts even if the estate were in the trustee. Of course if it is not, as I think it is not, it is an *à fortiori* case in favour of the Defendant.

Solicitors for Plaintiff: *Farrer, Ouvry, & Co.*

Solicitors for Defendant: *Kynaston & Gasquet*, agents for *Bell & Freame, Gillingham, Dorset.*

(1) 2 Sim. (N.S.) 12. (2) 17 Beav. 433.
(3) 2 Sim. (N.S.) 45.

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[1877 A. 40.]

"*New Street*"—*Cost of Paving—Improper Charge on General Rate—Order to recoup—Liability of Owners of adjoining Houses and Land—Jurisdiction—Metropolis Local Management Act*, 1855 (18 & 19 *Vict.* c. 120), *s.* 105—*Metropolis Local Management Acts Amendment Act*, 1862 (25 & 26 *Vict.* c. 102), *s.* 77.

Where within the metropolis a road has become a "new street" within the *Metropolis Management Act*, 1855 (18 & 19 Vict. c. 120), s. 105, and the district board has improperly charged the cost of paving the footpath of such new street upon the general rate of the parish in which it is situated, the Court will order the district board to restore to the general rate the amount so expended, and to levy the same upon the owners of the adjoining houses and land, as provided by the said section as varied by sect. 77 of the *Metropolis Management Amendment Act*, 1862 (25 & 26 Vict. c. 102).

Statement.

THIS was an information by the Attorney-General at the relation of *F. T. Lewis* and *W. Shillito*, who were occupiers of houses in the parish of *Putney*, and who, as such, were rated to all the rates made in that parish for all the purposes of the *Metropolis Management Act*, 1855, and the *Metropolis Local Management Amendment Act*, 1862—the parish of *Putney* forming part of the *Wandsworth* district under the last-mentioned Act.

The Defendants, the Board of Works for the *Wandsworth* District, were a corporate body constituted under the provisions of the first-mentioned Act for the management, in accordance with the provisions of the said Acts, of the said *Wandsworth* district, and had the control of the parish of *Putney* for the purposes of the said Acts.

The question in the case related to a portion of a highway known as the *Upper Richmond Road*, and which, as one of the ordinary highways of the parish, had been kept in repair out of the general rate since the year 1855.

This portion of the said highway, called in the pleadings "the road," was about 734 yards in length, and at the time of the passing of the *Metropolis Local Management Act*, 1855, ran between

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an irregular line of houses and market gardens on the south side, and market gardens on the north side. Between 1855 and 1874 a continuous line of houses had been built along the north side of the road, and several houses along the south side.

Statement.

Between 1864 and 1870 the Defendants had fixed a granite kerb along the footpath on the north side of "the road," and made up such path with gravel over the whole width of the path from the kerb to the line of the fence of the new villas. The Defendants had also, since 1874, caused the footpath on the north side to be paved with asphalte, and had also caused portions of the footpath on the south side of "the road" to be paved with materials of the same kind as the footpath on the north side.

The whole of such paving had been paid for by the Defendants out of moneys raised under the provisions of the said Acts by a general rate levied upon all the ratepayers of the parish of *Putney* in obedience to precepts issued by the Defendants in that behalf, and the sums so raised and applied amounted to upwards of £900.

The Informant contended that the expenses of such paving were not properly payable out of the general rate of the parish, and claimed that an account might be taken of all moneys so expended, and that the Defendants might be ordered to restore and make good the amount thereof to the general rate or to the ratepayers upon whom the same had been levied; and that, for these purposes, the amount of the sums so expended might be levied in accordance with those provisions of the said Acts which provided for the levying of the expenses of paving of such a character and under such circumstances as the paving in question.

It appeared that the auditor of the district board had seen and passed the items relating to the paving of the said footpaths, amounting to £995.

Argument.

Chitty, Q.C., and *Dryden*, for the Informant:—

The question of the liability of the general ratepayers to pave this particular road has already been the subject of judicial decision in the Court of Appeal from inferior Courts in the case of *Dryden* v. *Overseers of Putney* (1), where it was held that "the road" had become "a new street" within the *Metropolis Local*

(1) 1 Ex. D. 223.

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Management Act, 1855, and that the Board of Works for the *Wandsworth* District had no power to charge the cost of paving the footpath upon the general rate, but that it was compulsory upon them to obtain payment thereof from the owners of the adjoining houses and land under the *Metropolis Local Management Acts Amendment Act*, 1862, s. 77. This being so, the Defendants are clearly bound to recoup the general rate to the amount which has been thus wrongfully levied, and to take steps to obtain the same from the persons who are liable to pay it.

Argument.

Bagshawe, Q.C., and *Romer*, for the Defendants:—

The proper remedy for the relators was by an appeal against the rate. It is now too late for the Court to interfere, as the auditor has passed the rate, which is conclusive.

The principles laid down in the cases of *Attorney-General* v. *Andrews* (1), *Attorney-General* v. *Eastlake* (2), and *Attorney-General* v. *West Hartlepool Improvement Commissioners* (3) do not apply. And we contend that the Court has no jurisdiction to make an order directing the costs of the paving this footpath to be defrayed by a rate levied on the owners of houses and land adjoining the road, and the amount repaid to the general rate of *Putney* parish. No case can be cited in which this has been done.

Even if the kerbing and gravelling of the footpath was a "paving" within the definitions of the Acts of 1855 and 1862, yet the laying down of asphalte is not within those definitions; it was only a repairing of the footpath, so that the work done before the asphalte was laid down fulfilled and exhausted everything for which, under the alleged powers of sect. 105 of the Act of 1855 and sect. 77 of the Act of 1862, the owners of the adjoining houses and lands could be made liable.

JESSEL, M.R.:—

Judgment.

This case only shews that new cases require, not the application of new law, but the application of old principles of law in a new way; nothing more.

(1) 2 Mac. & G. 225. (2) 11 Hare, 205.
(3) Law Rep. 10 Eq. 152.

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Judgment.

The complaint in this case is the complaint of the Attorney-General, at the relation of certain ratepayers of the parish of *Putney*, against the Board of Works for the *Wandsworth* District, which includes the parish of *Putney*. The complaint is in substance this, that whereas by law the paving of a new street ought to be borne by the owners of adjoining houses and lands, they have applied the district rate, that is, the general rate of the district, in payment of such paving to the extent of £900, and it seeks to do justice by recouping the general district rate, and compelling the board to do what is right, and make the owners of the houses and lands adjoining the road pay this for the future. It appears, further, that you can make the owners of the adjoining houses and lands pay after the work has been done.

That being the simple case, is the Court so impotent that it cannot do justice? Is there no remedy because it is alleged that the auditor has once passed the items? That is not a release, and not pleaded as such, especially as the auditor could know nothing about it. I should be astonished, perhaps ashamed, if the procedure of the Courts of this country could not have found a means of setting such a mistake right, if it is a mere mistake.

First of all, as to the law of the case, the identical question as to the very same piece of road was raised before the Divisional Court of Appeal from inferior Courts in the case of *Dryden* v. *Overseers of Putney* (1); in fact the statement of claim in this case is copied from the special case on which the Judges decided that case. Therefore, as to the conclusion I ought to draw from the facts stated, that this was a new street, and was paved after 1855, and that the expense of the paving ought to be paid by the owners of adjoining houses and lands, that case is conclusive upon me.

The only question is whether there is any remedy. Now it is said, and I think it very likely to be true, that the exact case cannot be found. But the principle can be found. Soon after the passing of the *Municipal Corporation Act*, as is well known, many of the old corporations sought to deprive the new corporations of property held by the old corporations for what were decided to be public purposes; and with that view they either

(1) 1 Ex. D. 223.

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divided the corporation funds, that is, the funds of the old corporation, among themselves, or they gave them away to former friends or dependents, or they alienated them for insufficient sums, and the result was a great number of informations, several of which are reported, in which it was decided by the then Lord Chancellor, Lord *Cottenham*, that the individual corporators of the old corporation, being charged with the administration of public funds which were subject to trusts for public purposes, were liable for the wilful misappropriation of those funds, and could be made personally liable in a Court of Equity.

On the same principle, if you had not the individual corporators, but an existing corporation, which was a trustee for two sets of ratepayers, which is the case with the present Defendants, and the trustee for the two sets of ratepayers, instead of levying the rate from one set, levied it from the other, why should not the trustee have the power to set that right, and be required to set it right? It appears to me that the mere statement in the case shews that it can be done, even without making the new corporators, who committed what in this case is admitted to be a mere mistake, but not at all a wilful mistake, parties to the suit. The Board of Works for the *Wandsworth* District holds the funds really as a trustee for the ratepayers of the district, and to be laid out in accordance with the terms of the Act of Parliament. They are bound to raise the funds according to those terms, and apply them according to those terms. If they have applied funds raised from one set of persons to pay liabilities incurred by another set of persons from whom they can raise the rates, and an application is made within a reasonable time to set the matter right, it is impossible, I think, to argue that the Courts of Justice in this country are so lame and so impotent that they cannot order it to be set right.

I have no doubt that such an order can be made, and therefore I think the right order, considering that the board has made a mistake, is to direct the board to rectify the mistake by calling upon those who are liable to pay for the payment, and apply the money to be received from them in recouping the general fund out of which the payment has been wrongfully made. That order I propose to make; and, inasmuch as I cannot charge the absent parties, that is, the owners, who are in no way in default, with

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the costs of the action, it being a simple mistake by the board, I think it right that the costs should be paid out of the general fund.

Solicitor for Informant: *W. Reeve.*

Solicitors for Defendants: *Vallance & Vallance,* agents for *A. A. Corsellis, Wandsworth.*

M. R. 1877 *July* 31.

WILLIAMS *v.* HATHAWAY.

[1876 W. 13.]

Church-building Contract—Contract Price—Trustees of Building Fund—Vicar and Incumbent—Covenant with Builder—Personal Covenant—Extras—Action against Vicar's Estates—Liability confined to Period of holding Office—Exhaustion of Fund—Covenant binding Fund only.

A proviso which is in terms wholly repugnant to a covenant creating a personal liability is void; but a proviso only limiting the personal liability without destroying it is valid.

Furnivall v. *Coombes* (1) explained.

By two contemporaneous building contracts made in 1868 between the Plaintiff, a builder, of the one part, and *C.*, vicar of the parish of *St. Pancras*, and *A.*, incumbent of an ecclesiastical district within the parish, of the other part; after reciting that, under an Act creating the district, *C.*, or the vicar for the time being of *St. Pancras*, in conjunction with *A.*, or the incumbent for the time being of the district, were to apply a fund, payable to them by a railway company, in building a church and parsonage for the district; it was witnessed that in consideration of sums amounting together to the whole of the available building fund, to be paid to the Plaintiff by *C.* and *A.*, "their executors or administrators, or the person or persons for the time being entitled to apply the said fund under the said Act," the Plaintiff agreed with *C.* and *A.*, "and with such person or persons as aforesaid," and *C.* and *A.*, "to the intent (so far as they lawfully could or might) to bind such person or persons as aforesaid, but not so as to bind either of themselves or his heirs, executors, or administrators, after he or they should have ceased to be entitled to apply the same fund, did and each of them did agree with the plaintiff;" then followed provisions under which the Plaintiff was to build the church and parsonage in accordance with plans and specifications; and a clause stipulating that the consideration moneys should be paid in manner provided by the specifications. The specifications provided for monthly payments on account of the contracts; also that the architect might order additional works; and that payments for additional works were to be made on the completion of the entire works.

In June, 1869, *C.*, having obtained preferment, ceased to be vicar of *St.*

(1) 5 Man. & G. 736; 6 Scott, N. R. 522.

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Pancras, by which time the whole of the building fund had been exhausted. The buildings were completed in June, 1870.

In February, 1875, *C.* died, whereupon the Plaintiff brought an action against his executors to recover a sum alleged to be due for "extras" under the contracts:—

Held (1), that the liability of *C.* and *A.* respectively under the contracts was restricted to the period during which they were respectively vicar and incumbent, and therefore that *C.*'s liability terminated on his ceasing to be vicar; and (2) that in any case the liability of *C.* and *A.* extended only to the amount of the building fund, and no further.

Statement.

BY the *Midland Railway Extension to London Act*, 1863, the *Midland Railway Company* were authorized to take the Church of *St. Luke's, King's Cross*, within the parish of *St. Pancras*, of which church the Rev. *C. H. Andrews* was incumbent. By the 83rd section of the Act the sum of £12,500 was to be paid by the company to the vicar of *St. Pancras* and the incumbent of *St. Luke's*, to be applied by them, with the sanction of the Ecclesiastical Commissioners, in providing a new site and church for *St. Luke's* district, with power to apply any surplus for a parsonage house.

The Ecclesiastical Commissioners, having eventually decided that *St. Luke's* district should be incorporated with an adjoining district, and that a new district should be formed within the parish of *St. Pancras*, an Act of Parliament was obtained for the purpose, entitled *The St. Luke's (King's Cross) District Act*, 1868, which authorized the constitution of a new ecclesiastical district, to be called the *New Kentish Town District*, and appointed the Rev. *C. H. Andrews* to be its first incumbent. It was further enacted (sect. 7) that the Rev. *W. W. Champneys*, the then vicar of the parish of *St. Pancras*, or the vicar thereof for the time being, in conjunction with *Andrews*, or the incumbent for the time being of the new district, should, subject to the provision thereinafter contained for payment of the costs of obtaining the Act, apply the said sum of £12,500 to the satisfaction of the bishop of the diocese and of the commissioners, first, in the purchase, if necessary, of an appropriate site for and in providing a church for the new district; and, secondly, in case of any surplus remaining, in purchasing a site for and in providing a parsonage house for such district. Sect. 10 directed that the expenses of obtaining the Act should be paid out of the £12,500.

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A site for a church and parsonage for the new district was granted gratuitously by the Dean and Chapter of *Christ Church, Oxford.*

By a memorandum of agreement made on the 23rd of July, 1868, between the Plaintiff, a builder, of the one part, and *Champneys* and *Andrews* of the other part; after reciting the Act of 1868, and that *Champneys* and *Andrews* were, with the consent of the bishop of the diocese and of the Ecclesiastical Commissioners, about to provide a church for the said new *Kentish Town* district, to be called *St. Luke's Church*, "It was witnessed, that in consideration of £9391 to be paid by the said *W. W. Champneys* and *C. H. Andrews*, their executors or administrators, or the person or persons for the time being entitled to apply the said fund under the said Act of 1868, to the Plaintiff, his executors, or administrators, in manner thereinafter specified or referred to, he, the Plaintiff, agreed with the said *W. W. Champneys* and *C. H. Andrews*, their executors and administrators, and with such person or persons as aforesaid, and the said *W. W. Champneys* and *C. H. Andrews*, to the intent (so far as they lawfully could or might) to bind such person or persons as aforesaid, but not so as to bind either of themselves, or his heirs, executors, or administrators, after he or they should have ceased to be entitled to apply the same fund, did and each of them did thereby agree with the Plaintiff, his executors or administrators;" then followed provisions under which the Plaintiff was to build the proposed new church to the satisfaction of the architect and in accordance with the plans and specifications therein referred to; and a clause stipulating that the consideration money should be paid in manner provided by the specification.

By the specification it was provided that the architect should have power to order alterations and additional works, the price of which was to be added to the contract "at the conclusion of the work;" that payments on account of the contract were to be made monthly upon the architect's certificate; and that payments for alterations and additional works were to be made "on the completion of the entire works after the balance had been ascertained by the architect."

By a second memorandum of agreement indorsed on the first,

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bearing the same date, and made between the same parties, a contract was entered into for building a parsonage house for the sum of £2615. It contained a covenant in the same terms as the first agreement; and also a stipulation that the provisions of the first agreement and specification should be applicable to the present agreement. The two sums of £9391 and £2615 mentioned in the contracts, amounting together to £12,006, constituted the available balance of £12,500 after payment of the costs of obtaining the Act of 1868.

In November, 1868, *Champneys* was appointed Dean of *Lichfield*, and on the 14th of June, 1869, he ceased to be vicar of *St. Pancras*, by which time the whole of the £12,006 had been expended under the contracts. The church and parsonage were completed in June, 1870, and disputes then arose as to the amount of the balance remaining due to the Plaintiff under the contracts, the Plaintiff claiming a sum of £1585 for additional works or "extras."

On the 4th of February, 1875, *Champneys* died, having by his will appointed the Defendants his executors.

In May, 1875, the Plaintiff commenced an action in the Common Pleas against *Andrews* for the £1585. In December following, that action was turned into a special case, which was still pending.

In January, 1876, the Plaintiff, alleging that *Andrews* was unable to pay the £1585, or any substantial part thereof, brought the present action against *Champney's* executors, claiming to be paid the £1585 with interest, "owing to him under and by virtue of the said agreements of the 23rd July, 1868;" and for accounts.

The Defendants delivered a statement of defence, alleging that *Champneys* did not after the 14th of June, 1869, when he ceased to be vicar of *St. Pancras*, interfere in any way in any matters relating to the agreements or in the works agreed to be performed thereunder; and they insisted that, according to the true construction of the Act of 1868, *Champneys*, upon and through his ceasing to be vicar, also ceased to be entitled to apply the fund mentioned in the Act and referred to in the agreements; and that according to the true construction of the agreements, *Champneys*, his heirs, executors, administrators, or estate or effects were not to be bound or

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in anywise liable thereunder after he had so ceased to be entitled to apply the same fund; and that under the circumstances the Plaintiff had not any rightful claim or demand whatever against *Champney's* estates and effects under the agreements, or either of them. The Defendants submitted further that all the funds payable under the Act of 1868 having been received and applied, it was never intended by the agreements that *Champneys* or his estate, even if he had continued vicar of *St. Pancras* until the contracts were finally completed, should be liable beyond the funds receivable under the Act, or in the absence of funds provided thereby; and further, that if the £1585, or any part thereof, was payable to the Plaintiff—which they did not admit—*Andrews* was solely, or at any rate primarily, liable therefor, and ought to have been made a party to this action. They also disputed various items in the Plaintiff's claim for extras.

The Plaintiff delivered a reply, and the Defendants joined issue thereon.

The action now came on for trial.

Argument.

Fischer, Q.C., and *Hadley*, for the Plaintiff:—

On the first point, we submit that *Champney's* estate now remains liable under these agreements. The covenant to pay the contract price is a personal one on the part of *Champneys* and *Andrews* jointly and severally; and that being so, the clause or provision attempting to limit that personal liability is void for repugnancy: *Furnivall* v. *Coombes* (1); *Hancock* v. *Hodgson* (2); *Luckombe* v. *Ashton* (3).

On the second point, the agreements do not limit the liability to the extent of the fund and no further; if such was the intention it should have been clearly expressed: *Greenwood's Case* (4).

[JESSEL, M.R.:—It seems to me, having regard to the recitals in the agreements, the Plaintiff never looked to the personal liability of *Champneys* and *Andrews*, but to this particular fund; and that the intention of the parties was to charge the fund alone. The question is whether that has been effectually done by the instruments.]

(1) 5 Man. & G. 736; 6 Scott, N. R. 522.
(2) 4 Bing. 269.
(3) 2 F. & F. 705.
(4) 3 D. M. & G. 459, 482, 483.

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The mere fact that all parties knew that there was a particular fund sufficient, or only sufficient, to meet the amount of the contracts, cannot of itself limit the personal liability of the covenantors who ordered the work: *Horsley* v. *Bell* (1); note to *Cullen* v. *Duke of Queensberry* (2); *Eaton* v. *Bell* (3).

[JESSEL, M.R.:—The agreement does not extend in terms to "executors and administrators," at least so far as the extras are concerned.]

It is not necessary to mention "executors and administrators" in order to bind them.

Chitty, Q.C., and *Kingdon*, for the Defendants, were not called upon.

JESSEL, M.R.:—

Judgment.

I must decide this case against the Plaintiff. The first question is one of law. It is said that if you find a personal covenant, followed by a proviso that the covenantor shall not be personally liable under the covenant, the proviso is repugnant and void. I agree that that is the law; but that by no means applies to a case where the proviso limits the personal liability under the covenant without destroying it, thus leaving a portion of the original covenant remaining: in that case the proviso is perfectly valid. There is no authority against that view. A distinction has always been taken between a proviso which is repugnant to the covenant and therefore void, and a proviso which can be incorporated in the covenant, and be made consistent with it. The leading case on the subject is *Furnivall* v. *Coombes* (4). There the churchwardens and overseers of a parish covenanted by deed "for themselves and for their successors" with a builder to pay for the repairs of the parish church. Then there was a proviso that nothing in the deed should be taken to extend to any "personal covenant" on the part of several covenantors or their estates in their private capacity, but only on the part of the churchwardens and overseers for the time being. The covenant being a personal covenant, it was held that the effect of the proviso that the covenant should not be

(1) Amb. 770.
(2) 1 Bro. C. C. 101.
(3) 5 B. & A. 34.
(4) 5 Man. & G. 736; 6 Scott, N. R. 522.

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a personal covenant was simply to destroy it: the proviso was repugnant to the covenant, and there was no way of reconciling the two things.

Chief Justice *Tindal*, in giving judgment, says (1): "Churchwardens and overseers, though they are by statute a corporate body for some purposes, cannot enter into such a covenant as this in a corporate character; and if not, then the contract must be a personal covenant. If it be, the next question is, what does it bind the Defendants to do? At all events it binds them, while they remain in office, to pay." So he contemplates the covenant as a covenant in force while the covenantors remain in office. Then the other Judges take the same view, and Justice *Cresswell* says (2): "I am of the same opinion. The Defendants first enter into a clear personal covenant, and then they endeavour, by the proviso, to relieve themselves from all personal liability;" not from some liability only, but from all liability. That agrees with what I have already said: a proviso limiting the personal liability under the covenant, that is, not destroying it, but leaving some personal liability still remaining, is a valid proviso: it is all incorporated into the covenant.

So much for the covenant. Now I come to the facts of the case.

[His Lordship then stated the circumstances under which Messrs. *Champneys* and *Andrews* became trustees of the building fund, and continued:—] Messrs. *Champneys* and *Andrews* have got a site and are going to build a church. They have got a fund which, after allowing for the costs of obtaining the Act of 1868, they assume to be ample for the purpose—a fund which they, as trustees, are bound to apply in accordance with the Act. They are going to contract with a builder, and I am sorry to say the question before me is which of two innocent parties is to suffer.

The vicar and incumbent, who are the trustees of the fund, then contract with the builder for the building of a church. Now did they contract with the builder that he should build the church, and that they would pay for it? Nothing of the kind. The contract, which is dated the 23rd of July, 1868, begins by reciting the Act of 1868 and the intention to build a church; it then states the contract price to be £9391, which is not to be paid by *Champneys*

(1) 5 Man. & G. 751. (2) 5 Man. & G. 753.

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and *Andrews* simply, but by them "or the person or persons for the time being entitled to apply the fund under the said Act."

Therefore the £9391 was supposed to be a sum which was to come out of the fund. It is obvious that the framer of this instrument assumed that there would be a certain fund to provide the £9391.

The agreement then goes on: "And the said *W. W. Champneys* and *C. H. Andrews*, to the intent (so far as they lawfully could or might) to bind such person or persons as aforesaid." What does that mean? The object is to bind the fund. The agreement is not as accurately framed as it might have been, but what the covenantors mean to say is, that they bind the trustees of the fund so far as they are able to do so. They can bind themselves, as the trustees for the time being, because they have the charge of the fund, and have power to direct the destination of it.

But then the covenant goes on: "but not so as to bind either of themselves or his heirs, executors, or administrators, after he or they should have ceased to be entitled to apply the same fund." That is a negative provision. What they mean to say is, "We as trustees bind the fund, but the moment we cease to be trustees we will not be liable for any breach of trust committed afterwards." That is the meaning of the covenant as I read it. It simply binds the fund, and makes the covenantors liable to apply the fund, but not in any event; for it does not make them liable to apply the fund the moment after they have ceased to be trustees. In that case the builder must proceed against the succeeding trustees.

Now Mr. *Champneys* ceased to be Vicar of *St. Pancras* in June, 1869, he having been appointed Dean of *Lichfield*, and he ceased to be vicar before the church was finished, which was in June, 1870.

There was a second memorandum of agreement indorsed on the first, and bearing the same date, which was a contract for building the parsonage house. According to the Act of 1868, the parsonage was to be built out of the surplus of the fund, and both parties, no doubt, thought there would be a surplus. Both agreements refer to specifications which contain what I am sorry to say specifications of this kind usually do contain, namely, a power for the architect to order alterations and additions; and it is provided

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that the payments for any such alterations and additions are to be made "on the completion of the entire works." Therefore as there could be no payment for extras until the completion of the entire works, it is plain that no claim could in any case be made against Mr. *Champneys* until that time, that is to say, in June, 1870, that is a year after he had ceased to be vicar and trustee.

It is now attempted to make the estate of Mr. *Champneys* liable for the amount of these extras, that is, for an amount *ultra* the fund, and it is said that his estate is bound by these contracts. Now, I am satisfied that both parties perfectly understood what they were about when they executed these contracts, and that their intention was that Messrs. *Champneys* and *Andrews* should be bound only during the time they were trustees of the fund, and that they were not to incur any further liability. It appears to me that that intention is sufficiently expressed and that the restriction of their liability to the period of their holding office respectively as vicar and incumbent is a perfectly legal limitation of their liability. Liability under a contract may be limited in various ways; for instance, two persons contracting for payment of a sum of money may stipulate that they shall each only be liable for half the amount. There is no law against such a limitation.

Assuming, therefore, as I do, that Mr. *Champneys* was not liable for the extras merely by reason of his being a trustee during the time he was Vicar of *St. Pancras*, I am of opinion that his estate is not under any legal liability whatever under the contracts, and consequently I dismiss the action.

It is no doubt a hard case upon the Plaintiff, but as the Defendants are executors, the action must be dismissed with costs.

Solicitor for Plaintiff: *I. H. Wrentmore*, agent for *C. Waldron, Cardiff.*

Solicitors for Defendants: *Rose & Fry.*

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MILDMAY *v.* QUICKE.

M. R
1877
June 4.

[1875 M. 80.]

Partition Action—Married Woman's Real Estate—Sale—Purchase-money—Reconversion—Partition Act, 1868, *s.* 8—*Solicitors—Charging and Stop Orders for Costs—Attorneys and Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Appearance by Counsel—Costs.*

By the decree in a partition suit a sale was directed of certain real estate, of which seven-eighths belonged to the Plaintiff and one-eighth to the Defendant, Mrs. *Q.*, a married woman, in fee. The Plaintiff having subsequently offered to purchase Mrs. *Q.'s* share, an order was made in Chambers, on the application of all parties, directing that, Mr. and Mrs. *Q.* accepting £1200 as the purchase-money for Mrs. *Q.'s* one-eighth, the Plaintiff should pay the amount into Court, which he did; but before any conveyance was executed Mrs. *Q.* died, leaving two infant daughters her co-heiresses. Mr. *Q.* took out administration to her estate:—

Held (applying the principle in *Foster* v. *Foster* (1)), that the £1200 must be treated as realty by force of sect. 8 of the *Partition Act*, 1868, incorporating sects. 23 to 25 of the *Leases and Sales of Settled Estates Act*, and therefore belonged to the co-heiresses, subject to Mr. *Q.'s* life interest as tenant by the curtesy.

Mrs. *Q.'s* solicitors obtained a charging order on the fund for their costs in the action under the *Attorneys and Solicitors Act*, 1860, s. 28, and afterwards a stop order. Having been served with proposed minutes of order on further consideration, they appeared by counsel and asked for their costs of obtaining the stop order and of their appearance:—

Held, that they must bear their own costs of obtaining the stop order and of their appearance.

FURTHER CONSIDERATION.

Statement.

The action was for the partition or sale of certain real estate, of which seven-eighths belonged to the Plaintiff and one-eighth to the Defendant *Mary Quicke*, the wife of the Defendant *J. M. Quicke*, in fee.

A decree for sale was made on the 10th of July, 1875.

The Plaintiff having offered to purchase Mrs. *Quicke's* share, an order was made in Chambers on the 11th of May, 1876, upon the application of the Plaintiff and Defendants, whereby, Mrs. *Quicke* and her husband accepting the sum of £1200 as the purchase-money for her one-eighth, it was ordered that the Plaintiff should pay the amount into Court to the credit of the cause, which he

(1) 1 Ch. D. 588.

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did; but before any conveyance was executed Mrs. *Quicke* died, leaving two infant daughters, her co-heiresses-at-law, who were made parties by revivor. Administration to Mrs. *Quicke's* estate was taken out by her husband.

Statement.

The question now was whether the fund in Court was, by virtue of the order of the 11th of May, 1876, to be considered as personal estate, and so vested in Mr. *Quicke* as his wife's administrator, or whether it passed as real estate to Mrs. *Quicke's* co-heiresses?

Argument.

W. W. Karslake, for the Plaintiff.

Northmore Lawrence, for Mr. *Quicke*:—

The order of the 11th of May, 1876, did not work a reconversion, for Mrs. *Quicke*, by consenting to the order, elected to take the purchase-money as personal estate: *Oldham* v. *Hughes* (1). In *Steed* v. *Preece* (2) your Lordship held that purchase-money arising from the sale of an infant's real estate under a decree passed on his death to his legal personal representative.

W. W. Follett, for the co-heiresses:—

In *Foster* v. *Foster* (3) your Lordship held that, where real estate to a share of which infants were entitled was sold under the decree in a partition suit, the proceeds of sale must be treated as realty, by force of the 8th section of the *Partition Act*, 1868, incorporating the provisions of sects. 23 to 25 of the *Leases and Sales of Settled Estates Act*. This case seems to be within the principle of *Foster* v. *Foster*, which your Lordship distinguished from *Steed* v. *Preece*.

Northmore Lawrence, in reply:—

Steed v. *Preece* was followed by Vice-Chancellor *Hall* in *Arnold* v. *Dixon* (4).

Judgment.

JESSEL, M.R.:—

I am of opinion that on the principle of *Foster* v. *Foster* I must

(1) 2 Atk. 452, cited in 1 Wh. & Tud. L. C. 4th Ed. pp. 865, 866.

(2) Law Rep. 18 Eq. 192.

(3) 1 Ch. D. 588.

(4) Law Rep. 19 Eq. 113.

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hold that there was a reconversion, and really the doctrine I there laid down is, if possible, more strongly applicable to this case.

A married woman was party to a partition suit, being entitled to a share of real estate. Her husband being alive was entitled to the share during coverture, and as a child was born, he would, in case he survived her, be entitled to an estate as tenant by the curtesy. Subject, however, to these rights of the husband, the married woman was absolutely entitled. Then in the lifetime of the married woman a decree was made for a sale under the *Partition Act*. Subsequently the Plaintiff, being entitled to seven-eighths, thought it better to offer a price for the remaining eighth, and in so doing carry out the decree for sale; and it was carried out thus: The married woman and her husband, being satisfied with the offer, the Court made an order for sale accordingly. The result was that the money for the one-eighth share of the married woman became as much liable to be disposed of in her favour, and in favour of those claiming under her, as if the whole estate had been sold, and the married woman's share of the purchase-money carried to a separate account.

Now, how would it have been disposed of in that case? It appears to me clear that whenever you have a person who cannot consent, and you import the provisions of the *Leases and Sales of Settled Estates Act*, you must understand them as saying that the purchase-money is to be laid out in land to be settled to the same uses; and as the married woman in this case had not conveyed by deed and had not herself consented to anything, for her alleged consent was really the consent of her husband, there was nothing which changed the destination of the money, and it was still liable to be laid out in land. And there was a very good reason for it, for the husband might then have preferred land, and the wife might have preferred it. The wife has, however, since died, and there is now very good reason why the husband should wish the money to be treated as personal estate; but the wife has not done anything to affect the equity for reconversion.

I am of opinion, therefore, that the principle of reconversion applies, and that, consequently, this is real estate, and, subject to Mr. *Quicke's* life interest as tenant by the curtesy, belongs to Mrs. *Quicke's* co-heiresses at law.

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M. R. 1877 MILDMAY v. QUICKE.

Mrs. *Quicke* had appeared separately from her husband by Messrs *Torr & Co.*, solicitors, who had obtained a charging order on the fund in Court for the costs due to them in the action, under sect. 28 of the *Attorneys and Solicitors Act*, 1860 (23 & 24 Vict. c. 127), and had since obtained a stop order. They had been served with the proposed minutes of order on further consideration, and now appeared by counsel.

J. T. Humphry, for Messrs. *Torr & Co.*, asked for their costs of obtaining the stop order and of their appearance.

JESSEL, M.R.:—

Messrs. *Torr & Co.* are not parties to the cause, and the fact of their having obtained a charging order does not entitle them to appear, except at their own expense. They must bear their own costs of appearance and of obtaining the stop order.

Solicitors: *Prideaux & Son*, agents for *R. Andrews, Modbury; Gregory, Rowcliffes, & Rawle; Torr & Co.*

M. R. 1877 June 30.

In re INTERNATIONAL PULP AND PAPER COMPANY.

KNOWLES' MORTGAGE.

Company — Winding-up — Director — Mortgage — Non-registration — Sub-mortgagee of Director—Companies Act, 1862, *s.* 43.

A company mortgaged freehold and leasehold property to *K.*, one of their directors, who then sub-mortgaged it to *H.*, a stranger, but neither of the securities was registered under sect. 43 of the *Companies Act*, 1862, the company never having kept a register of securities. *K.* took possession under his mortgage, and the company was afterwards ordered to be wound up. The title deeds of the property were in *H.*'s possession.

A summons by the official liquidator that *K.* and *H.* might be ordered to deliver up possession of the property and title deeds, was dismissed with costs.

Observations on *Ex parte Valpy & Chaplin* (1) and *In re Native Iron Ore Company* (2).

Statement.

ADJOURNED SUMMONS.

The *International Pulp and Paper Company, Limited*, being desirous of purchasing certain freehold and leasehold property

(1) Law Rep. 7 Ch. 289. (2) 2 Ch. D. 345.

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consisting of mills and premises at *Clondalkin*, in *Ireland*, borrowed for the purpose, under their articles of association, the sum of £15,000 from the *Crédit Foncier of England*, and by an indenture dated the 3rd of July, 1874, the company mortgaged the property to the *Crédit Foncier* as security for the £15,000.

By an indenture dated the 31st of July, 1875, to which the company was a party, the *Crédit Foncier* transferred the mortgage to *John Knowles*, a director of the company, in consideration of his having, at the request of the company, repaid the £15,000 to the *Crédit Foncier*.

By another indenture of the same date the company gave *Knowles* a further charge on the property for advances to them beyond the £15,000.

The total sum lent by *Knowles* to the company amounted to £17,500, which he had in fact borrowed for the purpose from one *Haworth*, who had no connection with the company, and by an indenture dated the 21st of October, 1875, *Knowles* sub-mortgaged the property to *Haworth* as security for the amount, according to an arrangement between them.

In the previous month of August *Knowles* had taken possession of the property under his mortgage.

The company ultimately became insolvent, and on the 4th of December, 1875, was ordered to be wound up on their own petition, their only assets being the mills and premises comprised in the securities. *Knowles* still continued in possession of the property, but the title deeds were in *Haworth's* possession.

It appeared that none of the securities had been registered in accordance with the 43rd section of the *Companies Act*, 1862 (1), and that in fact the company had never kept any register of mortgages or charges. *Knowles*, however, stated in evidence that at a meeting of the directors held on the 29th of October, 1875, at

(1) Sect. 43 of the *Companies Act*, 1862, enacts that "Every limited company under this Act shall keep a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register in respect of each mortgage or charge a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge. If any property of the company is mortgaged or charged without such entry as aforesaid being made, every director, manager, or other officer of the company who knowingly and wilfully authorizes or permits the omission of such entry shall incur a penalty not exceeding fifty pounds."

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M. R. 1877 *In re* INTERNATIONAL PULP AND PAPER COMPANY. KNOWLES' MORTGAGE.

which he was present, the company's solicitors instructed the managing director at once to prepare a proper register of securities, and that it was not until after the winding-up order had been made he discovered that no such register had been kept.

Under these circumstances, the official liquidator now applied, by summons, for an order that *Knowles* and *Haworth* should forthwith deliver up possession of the property and title deeds.

Argument.

Davey, Q.C., and *Solomon*, for the official liquidator:—

We rely upon *Ex parte Valpy & Chaplin* (1), and *In re Native Iron Ore Company* (2), where it was held by the Court of Appeal that no director or other person standing in a fiduciary relation towards a company can set up as against the creditors of the company a mortgage or charge held by him of the company's property, unless such mortgage or charge has been duly registered under the 43rd section.

[JESSEL, M.R.:—With the greatest possible respect for the Court of Appeal, I must say that those decisions do not commend themselves to my mind, and though I am bound to follow them in a precisely similar case, I shall not extend the rule.]

The rule is also laid down by Vice-Chancellor *Malins* in *In re Wynn Hall Coal Company* (3) and *In re General Provident Assurance Company* (4). An unregistered mortgage to a director is not necessarily void, but the mortgagee is in this position, that he cannot avail himself of it as against the general body of creditors: *Ex parte Valpy & Chaplin*. It was *Knowles'* duty, as a director, to see that both the mortgage and sub-mortgage were duly registered, and as to *Haworth* he took with constructive notice that *Knowles'* mortgage was one which could not be set up against the company's creditors, and he cannot be in a better position than *Knowles* himself.

Chitty, Q.C., and *J. P. Lake*, for *Haworth*, and *Marten*, Q.C., and *F. H. Colt*, for *Knowles*, were not called upon, but

Chitty, Q.C., mentioned *In re Borough of Hackney Newspaper*

(1) Law Rep. 7 Ch. 289.
(2) 2 Ch. D. 345.
(3) Law Rep. 10 Eq. 515.
(4) Ibid. 14 Eq. 507, 514, 515.

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Company (1), where his Lordship questioned the decision in *Ex parte Valpy & Chaplin* (2); and also referred, upon the question as to the validity of an unregistered mortgage, to the following passage in *Chitty* on Contracts (3): "Nor will a contract, which was not illegal when made, become illegal by relation; although the party making it was bound by law, under a penalty, to do a subsequent act which he has neglected to do": *Eyre* v. *Shelley* (4).

Judgment.

JESSEL, M.R.:—

It is very dangerous for a Judge who does not agree with particular decisions, to deal in distinctions from those decisions. Now I will not attempt to distinguish this case from the cases before the Court of Appeal which have been cited, but I will say this, that I do not consider them absolutely binding upon me in the present instance; and for this reason, that as I do not know the principle on which the Court of Appeal founded their decisions, I cannot tell whether I ought to follow them or not. If those decisions do lay down any principle I am bound by it, but I have not the remotest notion what that principle is.

As I understand those decisions, the Court of Appeal has decided that where a mortgage of the company's property to one of its directors or officers is omitted to be registered, that director or officer cannot avail himself of it as against creditors of the company. I must confess that I cannot understand why that should be the result. The 43rd section of the Act says that "Every limited company under this Act shall keep a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register, in respect of each mortgage or charge, a short description of the property mortgaged or charged, the amount of charge created, and the names of the mortgagees or persons entitled to such charge."

Now, of course the entry on the register cannot be made until after the mortgage is made, and a reasonable time must be allowed to elapse before such entry can be made, for the entry cannot be made at the same moment as the mortgage: so that if the mort-

(1) 3 Ch. D. 669.
(2) Law Rep. 7 Ch. 289.
(3) 10th Ed. p. 642.
(4) 6 M. & W. 269; 1 Sm. L. C. 7th Ed. p. 397.

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gage is void at all, it is void by reason of omission to register, that is, it is avoided by relation; but, as I understand the law, you cannot avoid a contract in that way. If a contract is void, it is through its being originally an illegal contract. The Act does not say that in case of omission to register the mortgage it shall be void. The Act imposes a penalty and nothing else, and it is a well-known principle that where an Act of Parliament imposes a penalty on the doing or omitting to do a particular thing, that is the only penalty. According to that principle the penalty for the omission to register is a penalty not exceeding £50, whereas I am asked, on the authority of the decisions of the Court of Appeal, to impose a penalty in this case of £17,500, for those decisions say that the penalty for the omission to register is the loss of the security.

Not being at liberty to guess what the principle of those decisions is, I must follow them if I have a precisely similar case before me, but I am only bound to follow them in a precisely similar case. What, then, are they?

I will first take the case of *Ex parte Valpy & Chaplin* (1), which was the case of a solicitor employed by a company omitting to register a charge given by them to him. Lord Justice *James* says: "Every one standing in a fiduciary position towards the company is bound to see that the company obeys the directions of the Legislature; and I am of opinion that the failure of the Appellant to do so is fatal to his case. It makes no difference that he was not the regular solicitor of the company; he acted as their solicitor in this matter; it was therefore his duty to see that, so far as this particular transaction was concerned, the register was properly kept."

With the greatest respect for the learned Lord Justice, I do not see that. I do not see how a solicitor, not being the regular solicitor of the company and not having the control of the register, is bound to see that the necessary entry is made.

The second case is *In re Native Iron Ore Company* (2). Lord Justice *Mellish* there says: "It is an established rule that where a director or officer of a limited company advances money on the security of a debenture or mortgage of the company and omits to register it in accordance with the Act, the consequence is that he

(1) Law Rep. 7 Ch. 289, 291. (2) 2 Ch. D. 345, 346.

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has no charge as against the creditors . . . . The rule so established is, in my opinion, founded on a perfectly good equitable principle." Then Lord Justice *Baggallay*, after expressing his concurrence and adopting the language used by Lord Justice *James* in *Ex parte Valpy & Chaplin*, says (1): "So in the present case the duty of these directors was to see that their debenture was registered according to the provisions of the Act, which are strict, distinct, and precise."

I should have thought that the penalty for not doing so was equally distinct and precise, and that if the invalidation of the mortgage had been the penalty intended to be imposed, the Act would have said so. However, it seems I am wrong, because there are two decisions of the Court of Appeal the other way. The rule laid down by them, and which we are to follow, is, that directors or officers of a company advancing money on the security of the company's property cannot set up the mortgage against the company's creditors unless it is registered. If there is any principle in those decisions at all it is not that want of registration makes the mortgage void—for Lord Justice *James*, in *Ex parte Valpy & Chaplin*, admits that it does not—but that there is some personal equity against a director or officer of a company which prevents him from setting up such a mortgage himself; but, as I understand, that principle, if it exists at all, does not apply to any person claiming under or through a director or officer, but only to the director or officer himself.

Now in this case the director was in reality nothing more than a bare trustee, having sub-mortgaged to *Haworth*. Why *Haworth* should have his security destroyed because *Knowles* omitted to have his mortgage registered, I am at a loss to understand. *Haworth* was neither a director nor an officer of the company, and the Court of Appeal has decided that it is only a director or officer who cannot set up an unregistered mortgage against the creditors of the company. The cases I have referred to are therefore not applicable to *Haworth*, and consequently, as the legal decisions do not stand in my way, I dismiss the summons, with costs.

Solicitors: *Keighley, Shea, & Bevan; Bower & Cotton.*

(1) 2 Ch. D. 347.

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M. R.
1877
July 23.

JOB *v.* JOB.

[1875 J. 28.]

Executor—Delivery of Assets to Third Party—Loss of Assets—Gratuitous Bailee—Liability—Charging Wilful Default—Accounts—Conflicting Rules in Law and Equity—Judicature Act, 1873, *s.* 25, *sub-s.* 11.

Where the assets of a testator have come into the possession of the executor and are afterwards lost to the estate, the rule at law as well as in equity now is, that the executor stands in the position of a gratuitous bailee, and therefore cannot be charged without some wilful default: *Judicature Act*, 1873, s. 25, sub-s. 11.

Semble, in an administration action under the new practice, an order charging an executor with wilful default may, in a proper case, be made at any time during the progress of the action.

Statement.

FURTHER CONSIDERATION.

The bill in this case, filed in March, 1875, was for the administration of the estate of a testator, *Joseph Job*, watchmaker, who died in September, 1872.

Shortly after the testator's death, the Defendant, who was the acting trustee and executor and also one of the residuary legatees under the will, entrusted part of the testator's stock-in-trade to his, the Defendant's, son *James Job*, a watchmaker and jeweller, for realization in the ordinary course of trade. *James Job* subsequently became bankrupt, whereupon his trustee took possession of and sold the stock-in-trade then in his hands, including part of the testator's to the value of £160, which thus became lost to the testator's estate.

A decree for the administration of the testator's estate was made on the 13th of January, 1876, and various accounts and inquiries were directed, including an account of personal estate not specifically bequeathed come to the hands of the Defendant, but no charge of wilful default was made against him by the decree. In taking the accounts, the Plaintiff, one of the residuary legatees, sought to charge the Defendant with the £160, but the Chief Clerk disallowed the claim, as no evidence was adduced to shew that the Defendant had ever proved for the amount against *James Job's* estate.

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The cause now came on upon further consideration, the main question being whether the Defendant was chargeable with the loss of the £160.

Argument.

Chitty, Q.C., and *Cozens-Hardy*, for the Plaintiff:—

An executor is chargeable for the goods of his testator if he fails properly to dispose of them, and if he has once received the goods and they are lost, he cannot escape liability unless he can shew he has properly discharged himself.

Davey, Q.C., and *Chester*, for the Defendant:—

An executor cannot be charged with wilful default when the decree does not so charge him. Here we acted *bonâ fide* and according to what we believed to be the best mode of realizing the property, and the rule in equity is, that if an executor accidentally loses the goods of his testator he is not chargeable with them as assets: *Williams* on Executors (1); *Jones* v. *Lewis* (2); though the rule seems to be otherwise at law: *Crosse* v. *Smith* (3).

Judgment.

JESSEL, M.R.:—

What is the rule in equity? I agree that in *Crosse* v. *Smith* it was laid down that an executor is liable at law for the loss of his testator's assets when they have once come into his hands; but if that is in conflict with the law of a Court of Equity, equity must now prevail. The real question then is, what is the rule in equity? Now I refer to *Jones* v. *Lewis* (4), where a common decree was made against an administratrix for an account. Part of the assets had been delivered by her to her solicitor, who was robbed, and it was held that she was not to be charged. Lord *Hardwicke* said, "If a trustee is robbed, that robbery properly proved shall be a discharge, provided he keeps them (the goods) so as he would keep his own. So it is as to an executor or administrator, who is not to be chargeable further than goods come to his hands; and for these not to be charged, unless guilty of a *devastavit*; and if robbed, and he could not avoid it, he is not to be

(1) 7th Ed. pp. 1668, 1807.
(2) 2 Ves. Sen. 240.
(3) 7 East, 246.
(4) 2 Ves. Sen. 240, 241.

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charged, at least in this Court." That is an old case, and, as far as I know, it has been always followed.

I will now take a modern authority. In *Williams* on Executors (1) the law is thus stated: "Again, upon the supposition that goods come fully into the possession and hands of an executor or administrator, but are afterwards wrongfully taken from him, a question arises whether such goods shall be considered assets in his hands. There are some authorities for asserting that things taken out of the possession of the executor are assets in his hands, unless they were taken by the Queen's enemies. But it should seem, at least in a Court of Equity, that an executor or administrator stands in the condition of a gratuitous bailee; with respect to whom the law is that he is not to be charged, without some default in him. Therefore, if any goods of the testator are stolen from the possession of the executor, or from the possession of a third person, to whose custody they have been delivered by the executor, the latter shall not, in equity, be charged with these as assets." Then, at p. 1807, the learned author refers to the passage I have read, and quotes a passage from Lord *Ellenborough's* judgment in *Crosse* v. *Smith* (2), shewing the rule at law to be that an executor was liable for the loss of assets once come into his hands. The rule there laid down is, however, as I have already intimated, not the rule now, even at law, for the *Judicature Act*, 1873, provides by sect. 25, sub-sect. 11, that where "there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail." The rule, then, at law as well as in equity, now is that an executor or administrator is in the position of a gratuitous bailee, who cannot be charged with the loss of his testator's assets without wilful default; and a further rule is that though he is liable in equity in case of wilful default, he cannot be charged with it unless an account is ordered against him on that footing: you cannot charge him with wilful default without making out a case; and therefore, under the old practice, unless wilful default was charged in the bill, you could not so charge him in the accounts. I think, however, that under the new practice an order charging him with wilful default may be made at any time on a proper case being made.

(1) 7th Ed. p. 1668. (2) 7 East, 246, 258.

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Judgment.

The present case stands simply thus: On the death of the testator, who was a watchmaker, his executor delivered part of his stock-in-trade, to the value of £160, to his son *James Job*, who was also a watchmaker and jeweller, for the purpose of being sold in the ordinary course of trade. *James Job* became bankrupt, and his trustee then took possession of all his stock-in-trade, including the goods of the testator, and sold the whole, as being within the order and disposition of the bankrupt.

Now, if that was right on the part of the trustee, it could only be so through *James Job* having mixed up the testator's goods with his own stock-in-trade; and I must take it that he did mix them up with his own stock-in-trade, and therefore that the trustee was entitled to sell. On that presumption the executor was not liable for allowing the trustee to sell; and if, on the other hand, the trustee was wrong, you cannot charge the executor for not suing the trustee. Taking it either way, the executor is not, in my opinion, liable for wilful default.

Solicitors: *G. Cheesman*, agent for *Phillips & Cheesman, Hastings; Wright, Bonner & Wright*, agent for *W. Cammack, Hastings.*

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V.-C. M.

1877

June 12.

MEEK *v.* DEVENISH.

[1875 M. 29.]

Devise of Real Estate—Direction to Sell—Contingency—Conversion—Election to take in Specie.

A person contingently entitled to the proceeds of real estate directed to be sold may, pending the contingency, elect to take the estate as realty, and such election will become operative upon the contingency happening before or upon his death.

Statement.

GEORGE MEEK made his will, dated the 29th of May, 1851, and thereby, after giving various legacies, gave, devised, bequeathed, and appointed all the rest, residue, and remainder of his real and personal estate and effects to which he might be entitled, or which he might have power to appoint at the time of his decease, to his wife and his son *George Meek* the younger, and *Charles Henry Weston*, their heirs, executors, administrators, and assigns, according to the natures and quality thereof respectively, upon trust to sell and dispose of the same, with power nevertheless for his trustees for the time being in their discretion, and for such time as might seem expedient, to defer the sale and conversion of all and any part of his residuary, real, and personal estate, and so long as his real estate, or any part thereof, should remain unsold, to keep the same in tenantable repair. And the testator declared that his trustees for the time being should stand possessed of the money arising from his said residuary, real, and personal estate upon trust, in the first place, to pay thereout all his funeral and testamentary expenses and debts, and upon further trust to invest the residue of the said money in manner therein mentioned, and to hold the same and the income thereof upon trust during the widowhood of his wife, out of the income to pay to his wife or her assigns, for her and their own benefit, the yearly sum of £750, and subject as aforesaid upon trust to pay the residue of the income which should accrue during the widowhood of his wife unto his son *George Meek* the younger, unless and until he should do any act whereby or in consequence whereof all or any part of the income, if made payable to him absolutely

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would become vested in, or disposable by, any other person or persons, or unless and until any legal or equitable proceedings should be taken or enforced against him or his property by reason whereof all or any part of the same income, if payable to him absolutely, might be applied for the purpose of satisfying any debt or debts then due, or thereafter to become due, from him; and in case the estate thereinbefore limited to his son *George Meek* the younger should determine during the widowhood of his said wife, then upon trust to pay the residue of the income thenceforth to accrue during such widowhood unto his said wife, and after her death or second marriage, which should first happen, upon trust as to one equal moiety of the trust premises, and the income thenceforth to accrue in respect thereof for his son *George Meek* the younger, his executors, administrators, and assigns absolutely, and as to the other equal moiety of the said trust premises, and the income thenceforth to accrue in respect thereof, in case the estate thereinbefore limited to his son *George Meek* the younger should not have determined during the widowhood of his wife under the proviso thereinbefore in that behalf contained, and his son should not have done any act whereby the second moiety should be vested in any other persons, then upon trust for the absolute benefit of his son *George Meek* the younger, his heirs, executors, and administrators. And after declaring that his son *George Meek* should not be deprived of the benefit of any of the trusts thereinbefore contained in his favour by reason of his executing any deed or deeds of settlement in contemplation of any marriage he might contract, the said *George Meek* the elder declared that in case of any event whereby the trust lastly above stated should become inoperative, that the said second moiety and the income thereof should be held by the trustees or trustee for the time being of his will, from and after the decease or second marriage of his said wife, upon certain trusts in favour of *George Meek* the younger and his wife and children, which in the events that had happened had failed, and were incapable of coming into operation.

By a settlement dated in September, 1858, made upon the marriage of *George Meek* the younger, to which *George Meek* the elder was a party, *George Meek* the elder covenanted that his executors

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V.-C. M. 1877 MEEK v. DEVENISH. Statement.

or administrators should within six months after the death of himself and *Amelia Meek*, his wife, pay to the trustees of the settlement the sum of £20,000, and that he the said *George Meek* the elder, his executors or administrators, would in the meantime, and until the £20,000 should be paid, pay to the trustees an annual sum of £1000, as and for interest on such sum of £20,000. Provided always, that in case he or his wife should pay the said sum of £20,000 during their lives then the annual payment of £1000 should cease, and it was declared that the £20,000 should be held by the trustees upon the trusts of the settlement.

George Meek the elder died on the 8th of December, 1859, and his will was proved by his son, who took possession of his real and personal estate, and thereout paid his debts and funeral expenses, except the £20,000 covenanted to be paid to the trustees of the settlement.

After the death of *George Meek* the elder, the freehold estates remained unsold, and *Amelia Meek* resided with *George Meek* the younger at *Brantridge Park*, which was part of the real estate, during his life. *George Meek* the younger was never declared bankrupt and never did or suffered anything whereby any of the interest to which he was entitled under the said will or settlement determined.

George Meek the younger, during his life, retained the annual sum of £1000 covenanted to be paid to the trustees of his settlement, and no part of the £20,000 had yet been paid.

George Meek the younger made his will on the 7th of December, 1874, and thereby after giving various directions as to his furniture, books, and other chattels, declared that it should be lawful for his wife during her widowhood to occupy his dwelling-house at *Brantridge Park* and the lands appertaining thereto, and subject thereto, he gave, devised, and appointed all his freehold and copyhold messuages, lands, tenements, and hereditaments in *Sussex*, being the estates devised by his father's will, to certain uses in favour of his sons and their issue (which in the events that had happened had failed), and in case of the failure of such estates, to the use of his daughter the Plaintiff, *Constance Amelia Meek*, for life, and after her death to the use of the first and every other son of his daughter in tail, with remainder to her first and other

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daughters in tail, with remainder to his daughter the Defendant, *Mary Florence Meek*, for life, and afterwards to her sons and daughters in tail, with remainder to certain uses in favour of his other daughters and their issue, and in case of the failure of such estates the testator directed that his said freehold *Sussex* estates should sink into and form part of his residuary estate. And the testator bequeathed all his personal estate to his trustees to sell and convert into money, and stand possessed thereof in trust for all his children upon attaining twenty-one in manner therein mentioned.

Statement.

George Meek the younger died on the 8th of December, 1874, and his legal personal representatives became also the legal personal representatives of *George Meek* the elder. *George Meek* the younger left his wife *Fanny Amelia Meek*, and *Amelia Meek*, his mother, and the Plaintiff and the Defendant, *Mary Florence Meek*, who were infants, his only children him surviving. *Fanny Amelia Meek* died on the 13th of December, 1874, and *Amelia Meek* died on the 15th of December, 1874. *George Meek* the younger was at his death possessed of real and personal estate of considerable value in addition to the *Sussex* estate specifically devised by his will.

The bill was filed for the administration of the real and personal estate of *George Meek* the younger, and for the administration of the real and personal estate of *George Meek* the elder, and for carrying out the trusts of both wills under the direction of the Court.

Argument.

Glasse, Q.C., and *Levett*, for the Plaintiff:—

The question now raised is, whether under the will of *George Meek* the younger, the property which he took under his father's will passes as real or as personal estate. The son, by his will, has dealt with it as real estate, and during his life he dealt with it as such. If the property is still to be considered realty, it will go to the Plaintiff his eldest daughter as his devisee; but if it is personal estate, then it will belong to the residuary legatees, that is to say, it will be divided between both the daughters of the testator instead of going in the first instance to one only. There was a clear election by the son to keep the property as freehold. He lived with his mother in the family mansion and never sold any

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V.-C. M. 1877 MEEK v. DEVENISH. Argument.

portion of the estate. But he retained out of the income the £1000 which was covenanted to be paid to him by the settlement. This case comes within the law as laid down in *Mutlow* v. *Bigg* (1), we are therefore justified in assuming that with the consent of the legatees and all the rest of the family, there was an election to keep the property as freehold estate.

Bristowe, Q.C., and *Giffard*, for the second daughter of *George Meek* the younger:—

By the will of *George Meek* the elder there is an absolute direction to convert the real estate, and it was the duty of the son, who was the sole acting trustee, to have sold the estate. He never discharged himself of the duty of a trustee. He could not do otherwise than receive the rents, since he had to pay his mother £750 a year, and to retain for himself the money covenanted to be paid to him under his marriage settlement. It was not unlikely that he wished to retain the estate in specie during his mother's life, in order that she might continue to reside in the house, but there is no act of his which can be construed as an election to keep the property unsold after her death. If the son had done anything to vest the property for the benefit of other persons during the life of his mother he would not have been entitled to the real estate, therefore the estate was not his absolutely. He was only entitled in certain events which might happen during his mother's life. The trust had not been wound up, and if he had died intestate the whole produce of the estate must have gone to his legal personal representatives. *Sisson* v. *Giles* (2) is in favour of our contention.

J. Pearson, Q.C., and *Northmore Lawrence*, for the trustees and executors of the will.

Higgins, Q.C., and *E. Ford*, for the trustees of the marriage settlement.

Judgment.

MALINS, V.C., after stating the effect of the will to be to give *George Meek* the younger, after his mother's death, one moiety of the estate absolutely, and to give him the other moiety in the

(1) 1 Ch. D. 385. (2) 3 D. J. & S. 614.

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event (which happened) of his not doing any act during the widowhood to divest the income, or any act to divest the second moiety, continued:—

Now comes the question whether he was entitled to the whole produce of this estate? In my opinion there can be nothing more clear than that a person who is absolutely entitled to the produce of real estate has a right to say, "I will not have it sold, I desire to keep it in specie," and if the trustees resist that demand he can, as a matter of course, get an injunction to prevent their selling, provided the necessary provision is made for charges, and it is equally clear that if the person giving that notice is not absolutely entitled, but that other persons are interested with him, that is, if the property is divided between two persons and one of them gives notice that he will retain it in specie, that is an absolute nullity against his companion, because he cannot do anything to prejudice another person, and the trustees would be bound to sell. If a man gives his property to be sold, and divides the proceeds into one hundred shares, and gives ninety-nine of those shares to *A.* and one share to *B.*, *A.* cannot, without *B.*'s concurrence, retain the property in specie, and *B.* would have a right to say, "I will have it sold;" and, therefore, unless you get the concurrence of all parties no election can take place.

The other point which I have to decide here (and it is one upon which I have had not the slightest doubt from the moment the case was opened) is, whether a person who is entitled absolutely in a contingent event may not, before the happening of the contingent event, bind the trustees and say to them, "If the contingent event happens before my death I will elect to have this property kept in specie." I have no doubt whatever that if the property is given to trustees upon trust to sell and pay the produce to *A.* if one event happens, and to *B.* if another event happens, and *B.* says, "If I become entitled to this property I will not have it sold," and that event happens in his favour, he has an equal right to say to the trustees, "I will not have the property sold." It is not necessary that he should be absolutely entitled to the whole property when he gives the notice, but when he becomes entitled the previous notice is operative. In this case the testator, *George Meek* the younger, was absolutely entitled unless

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an event should happen which never did happen, and therefore if he had given formal notice to the trustees they would have been bound to obey that notice when it was ascertained, as it was on his death, that in the event that happened he became absolutely entitled to the property.

Now is there anything to be found in the books contrary to that? I should be astonished if there were. The only case relied upon is the case of *Sisson* v. *Giles* (1), which is a decision of Lord *Westbury's*. The decision is this—two persons were absolutely entitled to the produce of real estate; they were required to execute a deed-poll requiring the estate not to be sold. Nothing could be more clear than that that would stop the sale, but it turned out that one of them was a married woman, and the deed, therefore, went for nothing. That case is no authority in favour of the arguments I have heard from Mr. *Bristowe* and Mr. *Giffard*.

Then is there any principle on which a man who is entitled to an estate in a contingent event, which may happen in his favour, may not give notice that if that event does happen he will have the land itself instead of the money? A man may have a favourite estate, as I have pointed out, given to him in a contingent event, and would not have it converted into money at any price whatever. Suppose a boy to be entitled to the estate, and if he dies under the age of twenty-one some one else becomes entitled, and he says to the trustees, "Mind, if I become entitled to the estate I will keep it in specie," it would be a monstrous thing to say that, notwithstanding he gave that notice, he has no right to retain the estate in specie. That would be contrary to all principle. I believe the law to be thoroughly settled that, when a man is entitled to property in a contingent event, he may devise it, he may dispose of it, he may make it the subject of mortgage, or sell it, or make it the subject of election, or anything else. All he must do is to take care that nothing is done to interfere with the interests of third parties; and if notice is given while his interest is contingent, it is just as binding when the contingency happens as if it was given afterwards. If there were anything wanting to confirm me in this opinion, it would be the view taken by the

(1) 3 D. J. & S. 614.

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Court of Appeal in the case which Mr. *Glasse* cited to me of *Mutlow* v. *Bigg* (1).

My view on this point being perfectly clear and without a shadow of doubt, the only question that remains is, was there enough done by the testator to make an election? He survived his father for fifteen years. He and his mother and wife and family always lived in this place, and every act that he did shewed his intention to keep it in specie. That I admit would not be enough. If he had simply died intestate, notwithstanding these circumstances, I think it would have gone as part of his personal estate. But he makes his will, and by limitations of the most cautious nature, deals with this property, giving his land, giving the mansion house, giving the whole estate in specie, and limiting it to the elder daughter for life, with remainder to her first and other sons successively in tail, and failing her issue, with remainder over. Therefore he has shewn the clearest intention that this property shall not be converted, and that being the family residence, it shall be retained as such, and be the residence of the head of the family. I am as clear upon this point as I was upon the other, that he not only had the right to elect, but that he has done enough to make the election, and that this property must be treated therefore as part of his real estate; the consequence of which is that the infant Plaintiff is entitled to the estate for life, with contingent remainders to her issue and remainders over to her sister *Mary Florence Meek*, and in the same manner remainders to her issue.

The declaration will therefore be that *George Meek* the younger had power to elect to take as real estate the estate devised by the will of *George Meek* the elder, and that he did elect by his acts in his lifetime to do so, and that the estate is to be treated as his real estate.

Solicitors for Plaintiff: *Milne, Riddle, & Mellor.*
Solicitor for Defendant: *Rickards.*

(1) 1 Ch. D. 385.

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V.-C. M. 1877 June 14.

MASSAM *v.* J. W. THORLEY'S CATTLE FOOD COMPANY.

[1877 M. 104.]

Secret Process of Manufacture—Knowledge of Process—Right to Use of Name.

Any person who has become acquainted with the process of manufacturing an article which is in general secret is entitled to manufacture it, and if the name of the first manufacturer has become attached to the article, any person afterwards manufacturing is entitled to describe it by the name of such original manufacturer, and if he happens to be of the same name as the original manufacturer, he may use his name in describing his business, or allow it to be used by a company formed by him for the purpose of carrying on the business, notwithstanding that the representatives of the original manufacturer continue to carry on the old manufacture under the old name.

Statement.

THIS was a motion by the executors of *Joseph Thorley*, who had carried on the manufacture and sale of a compound known as "*Thorley's Food for Cattle*," seeking for an injunction to restrain the Defendant company from carrying on business under certain prospectuses so contrived as to represent the business carried on by the Defendant company as being the business of the Plaintiffs, or the goods manufactured or sold or supplied by the Defendant company as being goods manufactured, sold, or supplied by or for the Plaintiffs, and also restraining the Defendant company from using the Plaintiffs' trade-mark.

In the year 1855 *Joseph Thorley* commenced manufacturing, under the name of "*Food for Cattle*," a compound the nature of which was not disclosed, but of which, though he did not claim to be the discoverer, it appeared that during his lifetime he was the sole manufacturer. Subsequently to 1858 the business was carried on entirely in *London*. It had been previously carried on also at *Hull*.

From the time of his commencing business till his death, which happened on the 22nd of November, 1876, he extensively advertised and sold the compound under the name of "*Thorley's Food for Cattle*," and he made the name of *Joseph Thorley* conspicuous as a distinguishing mark in connection with the sale of the compound.

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The packets in which the article was made up were covered with brown wrappers, on which the words "*Thorley's Food for Cattle*" were placed conspicuously at the top of a drawing of a farmyard, and a facsimile of *Joseph Thorley's* signature was written in the right-hand corner.

It appeared that the process of manufacture, though a secret one, was not invented by *Joseph Thorley*, but was communicated to him by a Mr. *Fawcett*, who had introduced it, and that *Josiah Watson Thorley*, a brother of *Joseph*, who had for a long period acted as manager of *Joseph Thorley's* business, was also acquainted with the process. The Plaintiffs had registered under the *Trade Marks Registration Act* the facsimile of *Joseph Thorley's* signature as alone being the trade-mark of the business.

On the 13th of March, 1877, the Defendant company was registered under the *Companies Act*, 1862 and 1867, with a capital of £200, divided into 4000 shares of 1*s.* each, *J. W. Thorley* signing the memorandum of association for one share. The articles of association provided that the directors were to enter into an arrangement with *Josiah Watson Thorley* for the purchase of the secret process of manufacture and for his employment in the business of the company.

Shortly after commencing business the company issued and advertised a prospectus, headed with a facsimile of the seal of the company, which they had registered as their trade-mark, and the words "*J. W. Thorley's Cattle Food Company, Limited.*" It contained the following passages:—

"The company has been formed for the purpose of supplying agriculturalists, breeders of cattle, and the public in general, with this celebrated cattle food at a considerable reduction from the prices hitherto charged for this far-famed condiment.

"In making this announcement the company beg to say that, having made arrangements with Mr. *J. W. Thorley, brother of the late Joseph Thorley,* of *Thornhill Bridge, King's Cross, and for twenty-five years his manager*, all the food manufactured will be under his personal supervision and control, and all the ingredients used in its composition and preparation will be the very best that can be obtained, regardless of cost. Therefore the public may have every confidence that the article manufactured and sold by

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V.-C. M. 1877

MASSAM v. J. W. THORLEY'S CATTLE FOOD COMPANY.

the company will be genuine and equally beneficial, *it being manufactured in accordance with the original recipe.*"

The prospectus also contained directions for the use of the compound, which were identical with those formerly issued by *Joseph Thorley.*

Statement.

The packets in which the article was wrapped also contained a facsimile of the seal of the company, and the words "*Thorley's Food for Cattle,*" and also directions for use identical with those in the advertisements.

Some correspondence had taken place between the solicitors of the parties, in which the Defendants claimed the right to use the designation "*Thorley's Food for Cattle,*" on the ground that they were really making the genuine article.

Argument.

Glasse, Q.C., and *Nalder*, for the Plaintiffs:—

The advertisements amount to a representation that the Defendant company are entitled to carry on the business formerly carried on by *Joseph Thorley.* The mere insertion of the initials "*J. W.*" is not sufficient to distinguish the one from the other; and though the name of the company is "*Thorley's Cattle Food Company,*" the article itself is described on the packets as *Thorley's Food for Cattle.* Even if *J. W. Thorley* were entitled to use the name, he could not give the company a right to use it. The company, however, is a mere sham, having no substantial capital and no means of carrying on a real business.

Higgins, Q.C., and *Townsend*, for the Defendant company:—

This case is completely covered by *James* v. *James* (1). The article in question has become well known in the trade, and is recognised as a commercial article in common use. Moreover, the company are entitled to say that they make *Thorley's Food for Cattle.* It is not disputed that *J. W. Thorley* knows how to make the article in question, and he has a perfect right to hold out to the world that he does make it. The company may do anything short of representing that the article is manufactured by *Joseph Thorley*: *Croft* v. *Day* (2). With regard to the company, the *Companies Act* does not limit the amount of the shares, and

(1) Law Rep. 13 Eq. 421. (2) 7 Beav. 84.

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there is nothing to prevent a company starting with any amount of capital, however small.

Glasse, in reply :—

This is a very different case from *James* v. *James* (1). This is obviously the case of some persons on the look-out for the means of availing themselves of the reputation of *Thorley's Food for Cattle*, and by obtaining the concurrence of *J. W. Thorley* in getting up a fictitious company to palm themselves off upon the public as representing the original business. *J. W. Thorley* is not the real trader, and there is that false representation in putting forward his name in connection with the company which the Lord Justice *Turner* referred to in his judgment in *Burgess* v. *Burgess* (2) as entitling a party complaining of it to relief.

Argument.

MALINS, V.C. :—

Judgment.

If this were a mere case of a trade-mark, it is perfectly clear that whatever trade-mark *Joseph Thorley* acquired, and had an exclusive right to, would now belong to the Plaintiffs as his executors. This right has been clearly established by such cases as *Wotherspoon* v. *Currie* (3), *Dence* v. *Mason*, which came before me on the 25th of January, 1877, *Croft* v. *Day* (4), and many other cases. But this is the case of the production of a certain article which was made by *Joseph Thorley*, and is now made, or can be made, by *Josiah Watson Thorley*, who has just the same knowledge upon the subject as was possessed by his late brother. Now, under these circumstances, he proposes to set up in business. I will take the case first as if he were doing so in his own individual capacity. Would he then be entitled to carry on business and sell the article as "*Josiah Watson Thorley's Cattle Food*," or using his initials only, as "*J. W. Thorley's Cattle Food?*" The article is not a patented article, and it was known to each of the two brothers equally. Their name was "*Thorley*," and I can see no principle upon which, as *Joseph* was entitled to carry on business and call what he sells "*Thorley's Cattle Food*," *Josiah* is not entitled to do the same. His name is "*Thorley*," and he sells the same cattle

(1) Law Rep. 13 Eq. 421.
(2) 3 D. M. & G. 896.
(3) Law Rep. 5 H. L. 508.
(4) 7 Beav. 84.

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V.-C. M. 1877 MASSAM v. J. W. THORLEY'S CATTLE FOOD COMPANY. Judgment.

food, and I think that, even during the lifetime of his brother, if he and his brother had differed and separated, they would both have been entitled to sell the article as "*Thorley's Food for Cattle.*" But that did not happen, and *Joseph* seems to have had the exclusive use of the name during his lifetime.

Now, Mr. *Higgins* referred me to the case of *James* v. *James* (1), which was decided by Lord *Romilly* in 1872 as being conclusive upon this subject. And certainly it does decide a very important principle, and one which I think I am bound to follow in the present case. [His Lordship then read the head-note, and continued:—] Now, there the facts were that a lieutenant in the army named *Robert James* in 1833 discovered an ointment which became widely known as "*Lieutenant James's Horse Blister.*" The Defendant was the grandson of that Lieutenant *James*, and he set up in business and made this horse blister, the secret of which he had become acquainted with, and he also called it "*James's Horse Blister.*" Now, although he might make a horse blister, and even make the same blister as that discovered by his grandfather, *Robert James*, yet he was not entitled to call it "*James's Horse Blister.*" The Master of the Rolls, Lord *Romilly*, says this (2): "There are two points upon which I wish to hear the Defendants. I think they must not use the name of *Robert James* simply, but must put '*Robert Joseph James*'"—that being the real name of the Defendant—"I also think they must not in any advertisement, or in any circular, use any expression which asserts or suggests that the thing manufactured by the Plaintiffs is either spurious or not genuine. I will state my reasons for that: First, I am of opinion that when a person has discovered a valuable invention, and has not patented it, any one who has discovered the ingredients (I am not talking of the case of a breach of trust, or of fraud, or the like) may sell those ingredients, and may use the name of the person who has discovered them, after his death but not in his lifetime, so as to suggest they are made by him."

Some observation was made by Mr. *Glasse*, which is probably well founded, that there may not be such a distinction between what was done in the lifetime of the discoverer and after his death. I confess I think there is no difference, but if there be a

(1) Law Rep. 13 Eq. 421. (2) Law Rep. 13 Eq. 424.

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difference this is all in his favour, because this has occurred after the death of Mr. *Thorley*. The Master of the Rolls further says: "In this case Lieutenant *James* discovered a process for making a very valuable blister for horses. As soon as he died that became a matter of trade, and any person might make Lieutenant *James's* blister for horses after that time, provided he had got the prescription for that purpose properly and fairly. Any one who, in the course of the business, has ascertained how it is made, and chooses to state to the public that he has heard how Lieutenant *James's* blister for horses is made, in my opinion is entitled to publish himself as making Lieutenant *James's* blister for horses, provided he does not say anything to shew that it was made by the person to whom Lieutenant *James* has left his property. If there had been a question of fraud, or the Defendants were acting contrary to an agreement by which they were not entitled to do what they have done, then the Court would interfere; but that is not the question here, for what the Plaintiffs in this case really complain of is, not of the Defendants making the preparation, but of their calling it *Lieutenant James's Blister*. I am of opinion they are entitled to call it *Lieutenant James's Blister*, because it has acquired that title in the commercial world in the same manner as the '*Reading Sauce*' or '*Harvey's Sauce*.'" Now, therefore, the rule is laid down that this thing, "*Lieutenant James's Blister*," having acquired a reputation, being known by that name, any person using the same ingredients and producing the same result, was not only entitled to do the thing, but call it by the name of the original inventor, in order to identify it with the very same thing which Lieutenant *James* had invented. In the present case the evidence is conclusive that the thing produced by the Defendant *Josiah Watson Thorley* is the same as was produced and sold by his late brother *Joseph*. He is in possession of the same secret, obtained from the same source. He must undoubtedly not sell under the name of "*Joseph*," and he must not sell it in such a manner or with such a label, characteristic device, or advertisement as should lead the public to believe that the mixture was made by the late *Joseph Thorley*, or by his representatives, or by any other person than the Defendant himself.

The Defendant, I take it, is a man not possessed of any capital,

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not having set up business in his own individual capacity in the name of "*Josiah Watson Thorley*," as I am clearly of opinion he would have been entitled to do, and he has sufficiently shewn that he did not attempt to commit any fraud upon the representatives of his brother by using his own name, "*Josiah Watson*" or "*J. W. Thorley*," which distinguishes it from "*Joseph*." However, being, as I collect, a man of no capital, he forms a company, or becomes a party to the formation of a company, and, certainly, as far as the formation of the company is concerned, I do not entertain a very favourable opinion of it, because it is, of all companies that I ever saw, the most ridiculous, and I should not have supposed that such a thing could have been. It is a company having a capital of £200 divided into 4000 shares of 1*s.* each, and, accordingly, the memorandum of association is signed by seven persons for one share each. It appears that there is no limit by the *Companies Act*, 1862. If seven shillings will do, seven pence or seven farthings will do. Mr. *Higgins* says that what the Legislature has done must be taken to be right. If the Legislature has not thought fit to fix a limit below which the nominal amount of the shares shall not be, I suppose in law it is as legal to form a company with a certain number of shilling shares, as shares of one pound each, as is often done, or of any other amount.

[His Lordship then referred to the constitution of the company, and concluded that there was nothing in it to lead to the inference that it was not formed *bonâ fide* for the purpose of manufacturing the genuine compound as made by *Josiah Watson Thorley*, and continued:—]

If therefore I am right in saying that he would have been at liberty to set up this business in his own name, and to call this "*Josiah Thorley's Cattle Food*," he might have had one partner, he might have had five partners, he might have had any number, as a private partnership less than seven, and in law by the *Companies Act* it is provided that a man may associate with himself as many partners as he likes, 100, 1000, or 100,000 if he chooses, provided it is a company registered under the Act. That which he could do with regard to a private partnership he is at liberty to do with regard to a public company, and if it suited him and those associated with him, instead of working it as a private

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partnership to make it a public company. I am at a loss to see any ground upon which he is not entitled to say, "I carry on business not only in my own name, but in the name of a limited company. I am at the head of it, my name is valuable, the article we are going to make is the article known under the name of '*Thorley's Cattle Food*,' and this is a company for the manufacture of that food."

That being the case, is he doing anything which is calculated to deceive? [His Lordship then read and commented on the terms of the advertisement, and continued:—] Mr. *Glasse* says that the directions to use the food are precisely the same in both. If the article produced is the same, and he is quite at liberty to produce the same article, then these are the correct directions for the use of it, and he can only repeat them, and therefore the directions for the use of it are not improper.

Then is the trade-mark any encroachment upon any of the rights of the Plaintiffs? The trade-mark of the Plaintiffs is distinctly stated to be "*Joseph Thorley*." That is the facsimile of his name in his own handwriting. That is his trade-mark, and his only trade-mark. The label which he issues is the farmyard with the cattle about it, which, I suppose, eat this food. Well, the label here is the label of the Defendant, and he calls it, no doubt, "*Thorley's Food for Cattle*." It is *Thorley's Food for Cattle*. The Plaintiffs' trade-mark is simply "*Joseph Thorley*," with a facsimile of the signature in his own handwriting. The trade-mark of the Defendant is a label containing the heads of many of the animals who eat this food, if not all. It is as distinct as possible. On the whole, I come to the conclusion, according to what the Master of the Rolls decided in *James* v. *James* (1), that this "*Thorley's Food for Cattle*" has become an actual commercial name, and anybody who can produce the same article as this Defendant company does is undoubtedly entitled to the use of the name "*Thorley*," provided he does not use it in such a manner as to lead the public to believe that while they are buying the Defendants' condiment they are really buying the Plaintiffs'. I have been unable to discover anything which would lead the public to believe they were buying one for the other. One is "*Joseph Thorley's*

(1) Law Rep. 13 Eq. 421.

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Food for Cattle," and this will be advertised as "*Josiah Watson Thorley*," or "*J. W. Thorley's Cattle Food.*" The two things are so perfectly distinct, that I do not think there is any danger of fraud arising out of it.

Upon the whole, therefore, I think the motion must be refused.

Solicitors: *Collyer-Bristow, Withers, & Russell; W. Eley.*

V.-C. M. 1877 June 30.

THORLEY'S CATTLE FOOD COMPANY *v.* MASSAM.

[1877 T. 112.]

Injunction—Advertisement—False Statements—Injury to Trade—Judicature Act, 1873, *s.* 25, *sub-s.* 8.

Upon motion for an injunction to restrain the issuing of an advertisement containing false representations calculated to injure the Plaintiffs' trade,

The Court was of opinion that notwithstanding the decision in *Prudential Assurance Company* v. *Knott* (1), it now had power by the *Judicature Act*, s. 25, sub-s. 8, to restrain the publication of such an advertisement, but declined to do so upon an interlocutory application.

Statement.

THIS was a motion on behalf of the Plaintiffs, *Thorley's Cattle Food Company*, for an injunction to restrain the Defendants from advertising or representing in their advertisements or circulars that they were alone possessed of the secret for compounding the condiment known as "*Thorley's Food for Cattle*," and from representing that the cattle food manufactured and sold by the Plaintiffs was spurious or not genuine, or not compounded in accordance with the true recipe of the same ingredients, and in the same proportions and in the same manner, as the condiment known as "*Thorley's Food for Cattle*," manufactured and sold by *Joseph Thorley* in his lifetime.

The following was the advertisement complained of:—

"Caution. *Thorley's Food for Cattle.*

"The public, and in particular farmers, graziers, dealers, and others purchasing this world-famed food, are warned that any food for cattle purporting to be *Thorley's Food for Cattle*, and not signed

(1) Law Rep. 10 Ch. 142.

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with the name '*Joseph Thorley*,' is not the manufacture of this establishment carrying on business as *Joseph Thorley*, the proprietors of which are alone possessed of the secret for compounding that famous condiment, and carrying on business at *Pembroke Wharf, Caledonian Road.*"

Statement.

In a case of *Massam* v. *J. W. Thorley's Cattle Food Company* (1), the Plaintiffs, who are the Defendants in this case, and who are the representatives of the late *Joseph Thorley*, applied for an injunction to restrain the Defendants in that case and the Plaintiffs in this from carrying on their business under the prospectuses and advertisements issued by them, or under any prospectuses or advertisements so framed as to represent the business carried on by them as being the business of the Plaintiffs, or the goods manufactured and sold by them as being goods manufactured and sold by the then Plaintiffs.

In that case it appeared upon the evidence that *Josiah Thorley*, who was the promoter of the *Thorley's Cattle Food Company*, was brother to *Joseph Thorley*, by whom the food for cattle was originally sold, but it appeared also that *Josiah Thorley* was formerly the manager of his brother's business, and was in the habit of mixing or manufacturing the cattle food, and that the secret for compounding the condiment was communicated to both *Joseph Thorley* and *Josiah Thorley* by a person named *Fawcett*, who was the inventor of it.

The Vice-Chancellor refused to grant an injunction, being of opinion that *Josiah Thorley* had an equal knowledge of the mode of compounding the cattle food with his brother, and had an equal right to use the name of *Thorley's Cattle Food*. After the decision of the Vice-Chancellor, the Plaintiffs in that case gave notice to *Thorley's Cattle Food Company* that they discontinued the action.

Argument.

Higgins, Q.C., and *Townsend*, for the Plaintiffs:—

It was admitted in the case in which we were Defendants that Mr. *Josiah Thorley* had possession of the secret as well as his brother *Joseph Thorley*, both of them having had it from *Fawcett*. If the advertisement had omitted the last paragraph, stating that the Defendants are the sole possessors of the secret, we should not

(1) *Ante*, p. 574.

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have objected. The ground of your Lordship's decision on the previous occasion was that *Josiah Thorley* knew as much about the method of compounding the cattle food as his brother. We contend that it is a slander upon our title, and that we have a right to an injunction to restrain the publication of a false advertisement which is calculated and intended to injure our trade. The cases we rely upon in support of our argument are *James* v. *James* (1) and *Rollins* v. *Hinks* (2). The Defendants are entitled to say that none is genuine as the production of *Joseph Thorley* which has not got his name upon it; but they have no right to slander our title and to injure our trade by such an advertisement as this, which falsely represents that we are not able to manufacture the genuine food for cattle as originally made and sold by *Joseph Thorley*.

Glasse, Q.C., and *Nalder*, for the Defendant:—

In the first place the advertisement does not say that we are alone the possessors of the secret for making the cattle food, but that we are alone in possession of the secret for compounding that famous condiment, the manufacture of which is carried on at our establishment. But the Plaintiffs have no right to the interference of this Court by way of injunction, and we rest our case upon the *Prudential Assurance Company* v. *Knott* (3), where it was held that this Court has no jurisdiction to restrain the publication of a libel, even if it is injurious to property. In that case your Lordship's decisions in *Dixon* v. *Holden* (4) and *Springhead Spinning Company* v. *Riley* (5) were disapproved of. Here there is not even an allegation that special damage has been sustained.

Higgins, in reply, upon the point of jurisdiction:—

The case of the *Prudential Assurance Company* v. *Knott* is very different from this. That was a case of libel, but this is slander of title and damage to trade. They are publishing a libel upon our commodity, and at the hearing there would be an inquiry as to damages. Our writ is for an injunction and for damages, and I am

(1) Law Rep. 13 Eq. 421.
(2) Ibid. 355.
(3) Law Rep. 10 Ch. 142.
(4) Ibid. 7 Eq. 488.
(5) Law Rep. 6 Eq. 551.

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entitled to have the advertisement stopped pending the trial. In the case of the *Western Counties Manure Company* v. *Lawes Chemical Manure Company* (1), it was held to be actionable for the Defendants falsely and without lawful occasion to publish a statement disparaging the quality of the Plaintiffs' goods from which special damage resulted. That is precisely our case.

Argument.

But if the Court should consider itself fettered by the case of the *Prudential Assurance Company* v. *Knott* (2), there is further power now given to the Court by the *Judicature Act*, 1873, s. 25, sub-s. 8, to grant an injunction in all cases in which it shall appear to the Court to be just or convenient that such order should be made.

MALINS, V.C. :—

Judgment.

The object of the motion which was before me in *Massam* v. *Thorley's Cattle Food Company* was to restrain the Defendants, the company, from manufacturing and selling the condiment known as "*Thorley's Cattle Food.*" After a very lengthened hearing of that motion I came to the conclusion that the Plaintiffs had no exclusive right as representing the late *Joseph Thorley*, because it was proved to my complete satisfaction that a man named *Fawcett* was the inventor of this mixture, and had communicated it to the late *Joseph Thorley* and to his brother *Josiah Thorley*, the man who formed this company, and that the late *Joseph Thorley* and his brother *Josiah Thorley* possessed equal knowledge, derived from Mr. *Fawcett*, as to the ingredients or composition of the condiment. I therefore dismissed the motion with costs on the ground that *Joseph Thorley's* representatives had no exclusive right whatever to the title of "*Thorley's Cattle Food.*" I am told now that my decision was conclusive, because the Plaintiffs in that action were so far satisfied with my judgment that a few days afterwards they dismissed their action with costs; which, of course, is a complete and abiding submission to the propriety of the order I then made. A few days afterwards the executors of *Joseph Thorley*, who had thus failed in proving their title to the exclusive use of the title "*Thorley's Food for Cattle,*" did that which they

(1) Law Rep. 9 Ex. 218. (2) Law Rep. 10 Ch. 142.

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were perfectly entitled to do, advertise their food. They were entitled to advertise it in any way they thought fit so long as they did not state anything that was untrue, or anything that was calculated to injure the interests of *Josiah Thorley*. They accordingly issued the advertisement which has been read, concluding with these words: "The proprietors of which are alone possessed of the secret for compounding that famous condiment, and carry on business at *Pembroke Wharf, Caledonian Road*." Now, I can only read that advertisement as amounting to a statement that these persons carrying on business at *Pembroke Wharf, Caledonian Road*, are the proprietors of *Thorley's Cattle Food*, and that they alone are in possession of the secret of its manufacture. That statement is a positive untruth, because I have judicially decided the other way. In my judicial decision the parties who issued this advertisement have completely bound themselves by acquiescence. I must read this advertisement, not with the eye of a lawyer, not looking to see whether I can make it out to mean, by a very refined construction, something different from what it means to the public at large, but to ascertain what the public reading this advertisement would consider it to mean, and in that sense I take it to mean that if you want the genuine *Thorley's Food for Cattle* there is only one place in the world where you can get it, and that is at *Pembroke Wharf, Caledonian Road*, because the proprietors of that manufactory alone are in possession of the secret of making it. That, I repeat, is a positive untruth; because *Josiah* is as much in possession of the secret as the Defendants are, and knowing that, and taking part in the judicial proceedings which decided the facts against them, I think it was highly improper that they should issue an advertisement which they knew to be false.

The Plaintiffs, who are a company formed by *Josiah Thorley*, and who carry on their business under the name of "*J. W. Thorley's Cattle Food Company, Limited*," complain of this advertisement, because they say it is calculated to injure them in their trade; and I am very clearly of opinion that it is calculated to injure them in their trade, because if a purchaser believes this statement, that when he goes to *Josiah* he does not get the real article, he is deterred from buying from *Josiah* because the

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Defendants represent it as a spurious article. Is that fair trading? Is it becoming in any tradesman when he has an article to sell to insert a statement which he knows to be untrue? because these people know as well as I do that they are not exclusively in possession of the secret, that *Josiah* knows all about it as well as they do, and they therefore, by unfair means, attempt to get possession of the trade; not only retaining their own trade, but doing their best to prevent *Josiah* getting any trade. That is unfair dealing.

Now, under these circumstances, that this is a thing which ought to be stopped can, in my opinion, admit of no doubt whatever, and if I were not fettered by authorities I should, without the slightest hesitation, have granted an injunction to prevent the continuance of such a practice as this. If I am fettered by authority I can only say that I am very sorry for it. Mr. *Glasse* says that I am so because of the case of the *Prudential Assurance Company* v. *Knott* (1), which was decided by Lord *Cairns*, Lord Justice *James*, and Lord Justice *Mellish*, who held that in this Court you cannot maintain a suit to prevent the publication of a libel. I confess I do not read that judgment as going to that extent; if it does, I am very sorry for it. The case of *Dixon* v. *Holden*, which I decided in the year 1869, was referred to by Lord Chancellor *Cairns*, but he was very far from saying that he should not have decided the case in the same way as I did; he does not say that the case was wrongly decided, but that much might be said in favour of it. In that case Mr. *Dixon* was a merchant of great repute in *Liverpool*, and he happened to employ a solicitor of that town; that solicitor thought fit to quarrel with him about his bill of costs, or something of that kind, and he persisted in stating day after day, in newspapers and placards over the town, that Mr. *Dixon* had been a member of an insolvent firm which had failed, and that it was treated as a fraudulent firm; if that were true, Mr. *Dixon's* character and reputation as a merchant were gone. I thought, upon the general principle of this Court, which interferes by injunction to prevent the destruction of property, as we do interfere in very trivial matters where it goes to the destruction of property—I thought, and I still think, that that was a case in which this Court should most properly interfere to prevent that solicitor

(1) Law Rep. 10 Ch. 142.

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from issuing those scandalous libels which were calculated to destroy the property of Mr. *Dixon* in a most important particular —his character and reputation; because without character and reputation he could not have carried on his business of a merchant. That I decided, and I do not find that the Lord Chancellor expressed any dissent from it, although he does express dissent from the general doctrine that this Court can issue an injunction to prevent a libel. If, therefore, I am hampered in this case it is by what has been said by the Court of Appeal in the case of the *Prudential Assurance Company* v. *Knott*. In my own individual opinion I have not the slightest doubt whatever that it is, and it ought to be, as much the principle of this Court to stop publications which go to destroy property as to prevent the darkening of ancient lights, or the trespassing upon property, or anything else which goes to the destruction of property; and if I were perfectly clear that the principles laid down in the case of the *Prudential Assurance Company* v. *Knott* (1) were no longer in force I should unhesitatingly, upon an interlocutory application, grant the injunction now asked, which, I repeat, is only an injunction to prevent unfair trading, to prevent the issuing of a falsehood to the detriment of another; and it ought, therefore, in my opinion, to be prevented; but if the law remains as pronounced by the Court of Appeal in the *Prudential Assurance Company* v. *Knott*, I am fettered; I am not at liberty to do that which I certainly would do if I were unfettered. But Mr. *Higgins* says I am relieved from the decision in the *Prudential Assurance Company* v. *Knott* now by the *Judicature Act*; and to shew that, he has referred me to the 25th section, sub-sect. 8, of the *Judicature Act*, 1873, which is in these words: "A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked either before or at or after the hearing of any cause or matter to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Court shall think fit, whether the

(1) Law Rep. 10 Ch. 142.

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person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable." I certainly read that enactment as controlling the decision in the *Prudential Assurance Company* v. *Knott* (1).

If I had heard the case of the *Prudential Assurance Company* v. *Knott* I should have taken the same view of it as Vice-Chancellor *Hall* did. It was not a case for the interference of this Court upon an interlocutory application. It was a totally different case from *Dixon* v. *Holden* (2), and a totally different case from that of *Springhead Spinning Company* v. *Riley* (3), which is one of my own decisions, where I was applied to for an injunction by the owners of the *Springhead Company*—a company being large manufacturers and employing a great number of men, having a manufactory of great extent—against a trade combination—what is called a trade union. The manager of the trade union issued placards all about the neighbourhood, warning the men that they were not to go to that place to work, and if they did (I think it went to this extent), their lives would not be safe. I took a view in the case which I still take—I may be fettered by a superior Court—but although I am bound by that, I cannot surrender my own judgment. I decided against the trade union in that case, and I should decide the same way again if necessary. This Court interferes wherever there is a threatened destruction of property. In that case there was a course adopted by the trade union which went to the total destruction of a valuable mill. They would not let the men go to work, and without the mill being at work it would have gone to destruction. I know by experience that my order worked most advantageously to all parties, because such is the implicit obedience paid to the orders of this Court, that the trade union immediately desisted, the men went to work, and the mill, which up to that time had been useless, became immediately profitable. That is an instance of the beneficial application of the doctrine of this Court.

(1) Law Rep. 10 Ch. 142. (2) Law Rep. 7 Eq. 488.
(3) Law Rep. 6 Eq. 551.

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V.-C. M. 1877 THORLEY'S CATTLE FOOD COMPANY v. MASSAM. Judgment.

I am very much inclined to think that Mr. *Higgins* is right in his construction of the 8th sub-section of sect. 25, in saying that it does arm the Court with the power which possibly it had not before. I am very much inclined to think, upon the proper construction of that section, wherever the Court sees that an injunction ought to be granted, it may be granted. I see very plainly in this case that an injunction ought to be granted, and I believe I am therefore at liberty under this sub-section to grant it, and I am not fettered by the case of the *Prudential Assurance Company* v. *Knott* (1). At the same time I am bound to say that it involves considerations of the highest possible importance. This is an interlocutory application, and, if nothing further took place, possibly at the hearing of the cause, if ever it is brought to a hearing, I may be able to give full effect to the view I express. I think, however, upon the whole, as the point is a new one, it is much better that I should not upon this interlocutory application interfere, but that I should reserve the question to the hearing of the cause. I therefore simply refuse the motion; but I will give the parties the opportunity, if they consider it of sufficient importance, of taking the matter before the Court of Appeal, and they can properly decide what I cannot decide, whether what was said in the case of the *Prudential Assurance Company* v. *Knott* is now law, or whether it is controlled and superseded by that section.

Upon the whole, therefore, I think the better plan is not to grant an injunction upon the interlocutory application, but simply to refuse the motion, but in such a manner as to make the Plaintiffs' costs costs in the cause; but not the Defendants', because under no circumstances are the Plaintiffs to pay the Defendants' costs. The Defendants are the executors for *Joseph Thorley*, and they are in the hands of a highly respectable firm of solicitors, and now that this Court has expressed its opinion upon this advertisement, and has said, as I do most distinctly say, that it is calculated to mislead, I should expect these persons, who can only desire to carry on trade in a fair way, to alter the advertisement and expunge that which is calculated to mislead, and to leave only that which is fair. That is the suggestion I make, and the Defendants can act upon it or not, as they think fit.

(1) Law Rep. 10 Ch. 142.

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V.-C. M. 1877 THORLEY'S CATTLE FOOD COMPANY v. MASSAM.

Higgins:—Will your Lordship, in the place of refusing the motion, allow it to stand over until the statement of claim is filed, which will contain an allegation of special damage, and then we can renew our motion?

MALINS, V.C.:—I simply refuse the motion. When you have new materials you may renew the motion when you please.

Solicitors for the Plaintiffs: *W. Eley.*

Solicitors for the Defendants: *Collyer-Bristow, Withers, & Russell.*

SMITH *v.* CRABTREE.

V.-C. M. 1877 *June* 18.

[1873 S. 227.]

Construction of Will—Advances to Legatee—Set-off—Intention of Testator—Omission of Words.

A testator directed his trustees to pay his son £3000 and to invest £28,000 upon trust as to £10,000 for his widow during widowhood, and as to six sums of £3000 upon trust for his daughters and their children. The £10,000 was to fall into the residue at the death or marriage of his widow. And the testator directed his trustees to divide the residue into as many equal shares as he should have children living at the time of the death or second marriage of his wife, or then dead leaving issue, and upon trust as to one of such shares to invest £1000 for his son and his son's widow and children, and he gave directions as to the settlement of the share given to one of his daughters; and the will provided that any money advanced to his children and not repaid at his death should be set off against their share of the residue. The testator's son was indebted to him for advances in a sum nearly equal to his share of the residue:—

Held, that the legacy of £3000 to the son was not to be set off against his debt, but was to be paid immediately:

Held, also, that the words in the will directing the residue to be divided between the children living "at the death or second marriage of his wife" must be struck out as being manifestly inconsistent with the form of the will and the intention of the testator; and that all the children living at the death of the testator took vested interests in the residue.

Statement.

FURTHER CONSIDERATION.

William Smith, by his will, dated the 25th of April, 1871, gave his real and personal estate to trustees upon trust for sale and

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V.-C. M. 1877 SMITH v. CRABTREE. Statement.

conversion, and to stand possessed of the proceeds upon trust, after payment of his debts and funeral expenses, to pay to his son *Joseph Smith* the sum of £3000, and to invest the sum of £27,000 (increased by codicil to £28,000), and the trusts of the £28,000 were, as to £10,000, for the testator's widow during widowhood, and as to six sums of £3000, upon trust for the benefit of the testator's six daughters and their children. The £10,000 was directed to fall into the residue at the death or second marriage of the widow, and the share of any daughter whose children did not take a vested interest was also to fall into the residue. The testator directed his trustees to stand possessed of the residue of his personal estate (and of all sums directed in certain events to form part thereof) upon the following trusts:

"Upon trust to divide the same into as many equal shares as I shall have children living at the time of the death or second marriage of my said wife (which shall first happen), or then dead leaving issue, and to stand possessed of one of such shares upon trust to invest £1000 part thereof," and to hold the same upon trusts to pay the income to his son *Joseph Smith* and his son's widow successively for life, with remainder to *Joseph's* children. The will then proceeded as follows: "And I direct that my trustees shall pay the residue of such share (after deducting the said sum of £1000) to my said son *Joseph Smith*: And I direct that my trustees shall stand possessed of another of the said shares upon the same trusts for the benefit of my daughter *Elizabeth* and her children, as are hereinbefore declared or referred to with respect to the sum of £3000 hereinbefore bequeathed in trust for her and them, except the power of appointing the income thereof, or of any portion thereof, to her husband: And I direct that my trustees shall stand possessed of the others of such shares upon trust to pay one thereof to each of my daughters (except my said daughter *Elizabeth*) living at the decease or second marriage of my said wife, which shall first happen, her executors, administrators, or assigns, and if any of my said daughters shall be then dead, leaving issue then living, upon trust to divide or pay the share of each daughter so dying equally amongst all her children, or to her only child, his, her, and their executors, administrators, and assigns respectively."

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The will also contained the following clause:—

"Provided nevertheless that any sum or sums of money which I may have lent or advanced to or for the benefit of my said son, or any of my said daughters, or any of their present or future husbands, and which shall not have been repaid to me at the time of my decease together with all interest (if any) due thereon respectively, shall, if the amount thereof shall not exceed the amount of the share of residue to which such son or daughter shall be absolutely entitled under the bequests or trusts aforesaid, be taken in whole or part satisfaction thereof; and, if the amount thereof shall exceed the amount of such share, then I direct that my executors shall require payment from such son or daughter, or son-in-law, of the balance only of such debt and interest, after deducting the share of residue to which he or she shall be absolutely entitled as aforesaid."

The testator died in November, 1872, leaving his widow, his son *Joseph*, and his six daughters surviving, and they were all still living.

The testator advanced £4000 to his son *Joseph* in January, 1870, and £500 in January, 1872; and such sums, with arrears of interest raising them to about £5500, were still owing.

Under these circumstances the following questions arose:—

1. Whether the executors were entitled to retain the legacy of £3000 to the testator's son *Joseph* (the Plaintiff) in part satisfaction of the debt due by him to the testator's estate.

2. Whether the Plaintiff and the daughter *Elizabeth* took vested interests in the residue, or whether their shares were contingent on their surviving the testator's widow or dying in her lifetime, leaving issue.

3. As to the disposition of the surplus income of the residue during the widow's life.

On the first point,

H. Greenwood (*Glasse*, Q.C., with him), for the Plaintiff:—

There is a clearly expressed intention to charge the advances to children upon their shares of residue, and the Plaintiff is consequently entitled to immediate payment of his legacy of £3000.

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V.-C. M. 1877

SMITH v. CRABTREE.

The testator knew he had advanced £4000 to his son before he made his will.

Argument.

T. C. Wright, for Mrs. *Shepherd* (the daughter *Elizabeth*).

Dunning, for the other daughters, *contrà*.

Chapman Barber, for the executors.

It appeared that the residue, if divided into sevenths, would amount to about £6000 each share.

Judgment.

MALINS, V.C.:—

The testator, knowing he had advanced £4000 to his son, expressly directed a legacy of £3000 to be paid to that son, and deliberately directed all advances to his children to be charged upon their shares of residue. This is a sufficient indication of intention that the executors are not to retain the £3000 in part satisfaction of the debt. Whether the share of residue is vested or contingent is immaterial, and the Plaintiff is entitled to immediate payment of his legacy.

Upon the second point,

Argument.

H. Greenwood (*Glasse*, Q.C., with him), for the Plaintiff:—

The Plaintiff takes a vested interest in one share of the residue less the £1000 settled upon his wife and children. Such share must amount at least to one-seventh, and may amount to more. It is true that the division into shares is made dependent upon the number of children who survive the widow, or die in her lifetime leaving "issue," which here means "children." But the testator has expressly declared trusts of two shares in favour of his son, the Plaintiff, and his daughter *Elizabeth* (Mrs. *Shepherd*). As regards the Plaintiff there is no contingency. His share is given absolutely; and even if he should die without issue in the lifetime of the testator's widow, his own widow, if surviving, will be entitled to the income of £1000 part of his share. Moreover, there is no gift over to his children as in the case of the daughters' shares; nor is his own share liable, in certain events, to

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V.-C. M. 1877 SMITH v. CRABTREE. Argument.

fall into the residue like Mrs. *Shepherd's*. It is a simple, absolute gift to him of one share, less £1000. Mrs. *Shepherd* stands upon much the same footing; but the shares of the other daughters are contingent upon their surviving the widow or leaving issue "then living"; and it is observable that these words are not in the clause directing the division; and the Court will not insert them in such a case as this: *Martin* v. *Holgate* (1). Therefore, if any daughter (other than Mrs. *Shepherd*) happens to die, leaving children, who survive their mother but die before the testator's widow, such children will be taken into account in determining the number of shares into which the residue is to be divided, but will not be entitled to a share. The consequence would be that the residue would be divisible into more shares than the number of beneficiaries. In fact, the direction for division is inconsistent with the disposition of the shares; and where this is the case, and the inconsistent direction is evidently, as here, a mistake, the Court will say that it must be controlled by the subsequent disposition: *Berkeley* v. *Palling* (2). The testator never contemplated or provided for the event of the Plaintiff's death in the widow's life; he assumed that he would take a vested interest in one share (less £1000) upon the testator's death. The case falls within the principles laid down by Lord Justice *Knight Bruce* in *Key* v. *Key* (3), where it was held that the spirit must overcome the letter where the letter is evidently inconsistent with the intention. No life interest in the residue is given to the widow, and there is no reason for directing it to be tied up until her death. All the testator's children survived him, and are still living; and a declaration that the residue became divisible among them in sevenths at his death would be satisfactory to all parties.

T. C. Wright, and *Dunning*, for the daughters.

Chapman Barber, for the executors.

Judgment.

MALINS, V.C.:—

The evident intention of the testator was that all the children should have shares in the residue, which cannot be the case if

(1) Law Rep. 1 H. L. 175, 185, 187. (2) 1 Russ. 496.
(3) 4 D. M. & G. 73, 84, 85.

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V.-C. M. 1877 SMITH v. CRABTREE. Judgment.

these words are to stand. The passage in which the testator disposes of his residue is this: "Upon trust to divide the same into as many equal shares as I shall have children living at the time of the death or second marriage of my said wife (which shall first happen) or then dead leaving issue." It is clear to me that those words referring to the period of the death or second marriage of his wife were inadvertently thrown in. Looking at the whole form of the will the words are manifestly inconsistent with the intention, and must have been inserted by mistake. If I strike out the words, and read the passage thus, "Upon trust to divide the same into as many equal shares as I shall have children living, or then dead leaving issue," the whole will will be consistent, and will be in strict accordance with the intention of the testator. Can I then strike out those words? In *Surtees* v. *Hopkinson* (1) I reviewed the cases upon this subject, and then came to the conclusion that I should have been justified in departing from the strict language of the will in order to effectuate the manifest intention, if the language had been inconsistent with that intention. I am not aware that my observations in that case have been dissented from, and there is a case, recently decided in the Court of Appeal, that of *Greenwood* v. *Greenwood* (2), in which important words were added to a will by the Lords Justices on the ground that they had evidently been omitted by mistake. I think upon these authorities I am deciding strictly in accordance with the authorities—though it certainly is a strong decision—that those words should be omitted, and that all the seven children who survived the testator are entitled to vested interests in the residue.

Solicitors for Plaintiff: *H. B. Clarke & Son.*
Solicitors for Defendants: *Bell, Broderick, & Gray.*

(1) Law Rep. 4 Eq. 98. (2) 21 Sol. J. 630.

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SHEPHEARD *v.* BEETHAM.

V.-C. M.
1877
July 3.

[1872 S. 147.]

Charity—Mortmain—Pure and Impure Personalty—Premium upon granting a Lease—Costs—Marshalling Assets.

A testatrix bequeathed to an hospital all her household furniture and other things in her dwelling-house, and also all her ready money, money at the bankers, and money in the public stocks or funds of *Great Britain*, and also all other of her personal estate and effects which she could by law bequeath to such an institution, and she appointed executors, but made no further disposition of her property, real or personal:—

Held, that the charitable bequest was a specific bequest, and that the debts, funeral and testamentary expenses, and costs, must be paid first out of the undisposed of personal estate, next out of the real estate, and lastly out of the specific bequest; but that the specific bequest must exonerate the real estate from probate duty.

The testatrix, long before her death, had granted a lease of a house for thirty-one years at a low rent, with a premium of £600, which had not been paid:—

Held, that the unpaid premium being in the nature of purchase-money, for which there was a lien upon the land, could not be bequeathed to a charity.

Statement.

CORDELIA ANGELICA READ, by her will, dated in December, 1858, gave and bequeathed to the treasurer for the time being of the *Hospital for the Cure of Consumption* at *Brompton, Middlesex*, for the use of the said institution, all her household furniture, pictures, goods, chattels, trinkets, jewellery, and effects which might be in her dwelling-house in which she might reside at the time of her decease, and also all her ready money, money at the bankers, and money in the public stocks or funds of *Great Britain*, and also all other of her personal estate and effects which she could by law bequeath to such an institution. And she appointed *T. J. Annetts* (since deceased) and the Plaintiff *Charles Shepheard*, solicitor, executors of her will.

The testatrix died in December, 1871, a spinster, and at her decease her personal estate amounted in value to upwards of £100,000, and she was seised of or entitled to real estates of the value of between £40,000 and £50,000.

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V.-C. M. 1877 SHEPHEARD v. BEETHAM. Statement.

This bill was filed to administer the estate of the testatrix, and for an account of the rents and profits of the real estate which had been taken possession of by the heir-at-law of the testatrix.

In the year 1857 the testatrix had contracted to grant a lease of a public-house to two persons named *Walker* at a rent of £50 per annum, with a premium of £600. The lessees entered into possession, but the premium had never been paid, nor had the rent of the house. And it was stated by the lessees that the money had never been asked for.

The questions now raised upon further directions were: First, whether the premium of £600 was money arising from an interest in land, and therefore whether it came within the *Statute of Mortmain*, or whether it was pure personalty and was capable of being left to a charity? Secondly, out of what funds the debts, funeral and testamentary expenses, and costs, were to be paid?

Argument.

Higgins, Q.C., and *E. Beaumont*, for the heir-at-law, on the first question:—

We submit that the unpaid premium upon the public-house was not pure personalty, but was an interest arising out of land, and consequently that it is within sect. 3 of the *Mortmain Act* (9 Geo. 2, c. 36), and is not capable of being left to a charity. If the testatrix had agreed to sell the house out and out, the unpaid purchase-money would have been an interest arising out of land, and there would have been a lien upon the land for the money. The actual rent is not within the statute; *Brook* v. *Badley* (1); but the premium is in the nature of purchase-money. The rent of £50 was a very inadequate sum, and the £600 premium being the same as purchase-money, must form part of the undisposed of personalty, and go to the next of kin of the testatrix. The interest of the heir-at-law in this question is to increase the undisposed of personalty, which is small, in order to save the real estate from the liability as to debts and funeral expenses, which might otherwise be more than the personalty would be able to pay.

Glasse, Q.C., and *Cracknall*, for the persons entitled to the undisposed of personalty, followed the same line of argument.

(1) Law Rep. 4 Eq. 106.

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J. Pearson, Q.C., and *F. C. Norton*, for the *Brompton Hospital*:—

This premium was a personal debt due to the testatrix, and nothing more. The means of recovering it would be by a personal action against the *Walkers*, and there is no question of lien arising: *Edwards* v. *Hall* (1).

Humphry and *Beetham*, for some of the next of kin.

Higgins, in reply.

MALINS, V.C.:— Judgment.

The point I have to decide is this: The testatrix bequeathed to the treasurer of the *Brompton Hospital* all the goods and chattels in her dwelling-house, and also ready money, money at the bankers, and money in the funds, and all other personal estate and effects which she could by law bequeath to such an institution. Under this bequest the hospital will, it is said, be entitled to about £100,000, and they have already had £80,000 on account; but it happens that the testatrix, having died in 1871, entered into a contract in 1867 with two persons named *Walker* to grant a lease to them for thirty-one years of a public-house, in consideration of a rent of £50 per annum and a premium of £600. The lessees shortly afterwards entered into possession of the house, but they have not up to the present time paid any rent, nor have they paid the £600 premium, nor interest upon that sum. It is said they have not been called upon to pay the money, but however that may be, the question now arises whether the unpaid premium is money which the testatrix could legally bequeath to a charitable purpose. That the money is part of her personal estate no one disputes, but does it form part of her pure personalty which might be left to the hospital? It is quite clear that in the case of a mortgage upon land, the mortgage money, being a lien upon land, could not be left to a charity. That is not disputed. On the other hand, rent is not a lien upon land, because the remedy for the recovery of the rent is by distress on the chattels or by re-entry. So that rent might be given to a charity. Then, again,

(1) 6 D. M. & G. 74.

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V.-C. M. 1877 SHEPHEARD v. BENTHAM. Judgment.

unpaid purchase-money cannot be so given, because the vendor has a lien upon the land, and consequently it is within the *Statute of Mortmain*. Now is this money, rent? if so, it is not within the statute. In the case of *Brook* v. *Badley* (1) the Master of the Rolls decided that a surface rent to be paid by half-yearly instalments for such part of the minerals as should be gotten by the lessees, with powers of distress and re-entry in default of payment, was not within the statute, and could be given for charitable purposes.

Edwards v. *Hall* (2) also decided that arrears of rent could be given to a charity. If, therefore, this money is in the nature of rent, it does not come within the statute. It certainly cannot be distrained for, and there is no power of re-entry upon non-payment. It has, in fact, no incident of rent attached to it. Then what is it? A lessee is a purchaser *pro tanto*, he is treated as a purchaser so far as his interest goes. Suppose a man purchased the remainder of a lease for £600, that money would be purchase-money for the lease. You cannot call it rent because a lessor can distrain for rent.

The principle is the same whether the lessor receives rent and purchase-money or whether he receives purchase-money only. In my opinion, money paid by way of premium for a lease is in exactly the same position as purchase-money, whether there was a rent reserved together with the premium or not. Suppose the lessees had sold the lease, the purchaser must have known that the premium was unpaid. What remedy, then, would there have been for the recovery of the premium? There would have been no privity of contract between the original lessor and the purchaser from the lessees, and privity of estate there was none, therefore he must have recovered the premium by action for sale in respect of his lien.

Here there was a lease for thirty-one years, and the rent, as well as the premium and interest, was left unpaid for fourteen years, and the legal personal representatives of the testatrix would have been entitled to say, "We have a lien on the land for the amount of the premium."

Then it necessarily follows that the premium is purchase-money

(1) Law Rep. 4 Eq. 106. (2) 6 D. M. & G. 74.

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as far as it goes. In *Lancashire* there is a custom of fee farm rents, where half the money is usually paid in rent and half in an immediate payment. It cannot be denied that in such cases there is a lien upon the land for the cash payment. In this case, the rent reserved of £50 must have been less than the full value of the house, and the £600 must have been solely in the shape of premium. The premium was the same as purchase-money, and the lessor *pro tanto* has a lien for that purchase-money. Therefore the unpaid premium comes within the *Statute of Mortmain*, and could not be left for a charitable purpose.

The case was then argued upon the questions, first, whether the gift to the *Brompton Hospital* was a specific legacy, and secondly, out of what fund and in what proportions the debts, funeral expenses and costs, and the probate duty, were to be paid.

Argument.

Glasse, Q.C., and *Cracknall*, upon the second question:—

Where there are two funds, one of pure personalty and another of impure personalty, the debts, funeral expenses, and costs, must be apportioned rateably between the two funds: *Taylor* v. *Linley* (1). The whole residue ought therefore to bear the costs: *Eyre* v. *Marsden* (2). Part of the personalty being undisposed of does not affect the rule.

Where there is a gift of residue to be divided among certain classes of persons, the costs of ascertaining who is entitled are payable out of the whole residue before it is divided: *In re Reeve's Trusts* (3).

Humphry, and *Beetham*, for the next of kin:—

This is a residuary bequest to the charity, and the residue means the personal estate which remains after payment of a testator's debts, funeral and testamentary expenses, and costs. That was decided in *Elborne* v. *Goode* (4); *Shuttleworth* v. *Howarth* (5); and *Trethewy* v. *Helyar* (6).

(1) 5 Jur. (N.S.) 701.
(2) 4 My. & Cr. 231.
(3) 4 Ch. D. 841.
(4) 14 Sim. 165.
(5) Cr. & Ph. 228.
(6) 4 Ch. D. 53.

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V.-C. M. 1877 SHEPHEARD v. BEETHAM. Argument.

J. Pearson, Q.C., and *F. C. Norton*, for the hospital:—

This question was decided in *Taylor* v. *Mogg* (1). There a testator directed his executors to pay so much of his residuary personal estate as they could by law dispose of for charitable purposes, and made no further disposition of the residue, and it was held that the costs of a suit to administer the testator's estate ought to be paid out of the residuary personal estate inapplicable by law to a charitable purpose, and consequently undisposed of by the will. If the impure personalty is not sufficient, then the rest must be borne by the real estate. The rule that real estate undisposed of must be applied for that purpose in priority to personal estate effectually disposed of applies equally to real estate which descends by reason of lapse, and to that as to which no disposition has been made: *Scott* v. *Cumberland* (2).

But there is another view of the case, which is that the bequest to the charity is a specific bequest, in which case the specific legacy must be exonerated from all the debts, funeral and testamentary expenses, and costs, and they must be borne in the first instance by the undisposed of personalty, and then by the undisposed of real estate.

Higgins, Q.C., urged that at any rate the probate duty should not fall upon the heir-at-law.

Judgment.

MALINS, V.C.:—

The rules are clear that if a man gives his estate generally for charity, that would only be good as to so much of the estate as should be pure personalty. In that case there would be an apportionment of the costs and expenses between the pure and impure personalty. That was decided in *Taylor* v. *Linley* (3), but this case has been treated as the gift of a specific legacy to the charity. If so, the general estate would bear the debts, funeral expenses, and costs, so far as it is sufficient. Is it, then, a specific legacy? The testatrix does not dispose of her general estate, but she gives certain household furniture and other chattels, and all her ready money, money at the bankers, and money in the

(1) 27 L. J. (Ch.) 816. (2) Law Rep. 18 Eq. 578.
(3) 5 Jur. (N.S.) 701.

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funds. That is so far, by the terms of the will, a gift of certain specific articles. And then she says, "and also all other of my personal estate and effects which I can by law bequeath to such an institution." There is no other bequest, and the will is silent as to all but what she can dispose of to charity.

My opinion is that there is only one bequest, which is a specific legacy. It is true it was uncertain what was the amount of property which would be comprised within those words, but that does not prevent it from being a specific legacy.

Then, having decided that this is a specific bequest, it follows that, as between the specific legatee and the undisposed of personal estate, the latter must bear the debts, funeral and testamentary expenses, and those will be all the testamentary expenses in establishing the will, and it will include not only the expenses of proving the will, but also the probate duty. But when I come to the real estate, there is a clear difference as to the liability. The real estate goes to the heir by descent, and though he must be liable to the debts of the testatrix, it is not just that he should pay the probate duty, because, as he does not take under the will, he can have no interest in the will being proved.

If, therefore, the undisposed of personal estate is insufficient for the payment of probate duty as well as debts, funeral expenses, and costs, I think those who take the property ought to pay the remainder of the probate duty. Consequently the debts, funeral and testamentary expenses, and costs, must first come out of the undisposed of personal estate, and if that is not sufficient, the surplus must come out of the real estate. The undisposed of personalty must also pay the probate duty, but if that is insufficient the surplus must be paid by the *Brompton Hospital*.

Solicitors: *Norton, Rose, Norton, & Brewer; A. J. & B. Shepheard; Cowlard; H. W. Davie.*

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V.-C. M.
1877
July 3.

BESANT *v.* COX.

[1873 B. 264.]

Construction of Will—Executory Gift over—Death without leaving Issue—Restriction to Period of Distribution.

A testatrix devised lands to her daughter *S.* for life, with remainder to the husband of *S.* for life, and after the death of the survivor of them to all the children of *S.* by her then husband who should be living at testatrix's death as tenants in common in fee, and added a proviso giving over the shares of any of the children of *S.* who should "depart this life without leaving lawful issue" to the survivors or survivor of the children that should leave such lawful issue as tenants in common in fee:—

Held, that the words "depart this life without leaving lawful issue" must be restricted to death without issue at the period of distribution, viz., the death of the surviving tenant for life.

O'Mahoney v. *Burdett* (1) and *Ingram* v. *Soutten* (2) distinguished.

Statement.

ELIZABETH SHEPPARD, by her will, dated in July, 1841, gave and devised a public-house and brewery, together with various erections and buildings belonging thereto, unto and to the use of her daughter *Sarah Cox*, the wife of *John Cox*, and her assigns for life, and after her decease the testatrix gave and devised the same unto and to the use of *John Cox*, the husband of *Sarah Cox*, and his assigns for life, and after the decease of the survivor of them she gave and devised the same hereditaments and premises in the following words: "Unto and to the use of all and every the children of my said daughter by her said present husband that shall be living at the time of my decease, and to their respective heirs and assigns for ever as tenants in common. Provided always, and my will further is, that in case any or either of my said grandchildren shall depart this life without leaving lawful issue, then and in such case I give and devise the parts or shares or part or share of them, him, or her so dying without leaving lawful issue as aforesaid of and in the said hereditaments and premises unto the survivors or survivor of them my said grandchildren that shall leave such lawful issue, and to their heirs and assigns for ever as tenants in common."

(1) Law Rep. 7 H. L. 388. (2) Law Rep. 7 H. L. 408.

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V.-C. M. 1877 BESANT v. COX.

The testatrix died in May, 1843. There were six children of *John* and *Sarah Cox* living at the death of the testatrix. One died an infant in 1851 without issue; another died in 1852 leaving three children; a third died in 1859 leaving five children; a fourth died in 1862 leaving three children.

Statement.

John Cox died in August, 1866, and his wife *Sarah Cox* in May, 1867. Of the remaining two children one died in January, 1873, without having had any issue, and the sixth child was the Plaintiff, who had five children.

This suit prayed that there might be a partition or sale of the property, and that the rights of the parties might be ascertained and declared.

The Plaintiff was the sole beneficiary under the will of the child who died in 1873, and the share of the latter, therefore, if vested and not given over by the divesting clause, passed to the Plaintiff.

Argument.

Higgins, Q.C., and *Rowden*, for the Plaintiff:—

We contend that the words of the proviso, "depart this life without leaving lawful issue," must be restricted to death without issue at the death of the surviving tenant for life, which is here what may be called the period of distribution. The Court always leans against the postponement of absolute vesting. Up to the time when *O'Mahoney* v. *Burdett* (1) and *Ingram* v. *Soutten* (2) were decided no doubt could have arisen upon the construction of this proviso, the rule which was known as the 4th rule in *Edwards* v. *Edwards* (3), viz., that words indicating death without leaving a child must be construed to refer to the occurring of that event before the period of distribution, being well established by a long series of decisions. It is a mistake to suppose that this rule has been absolutely overruled by *O'Mahoney* v. *Burdett* (1) and *Ingram* v. *Soutten* (2). The judgment of Lord *Hatherley* in *O'Mahoney* v. *Burdett* states the true rule, that the period to which the executory devise will be referred will be the period of the death of the first taker, unless there are other circumstances and directions in the will which are inconsistent with that supposition.

(1) Law Rep. 7 H. L. 388. (2) Law Rep. 7 H. L. 408.
(3) 15 Beav. 357.

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V.-C. M. 1877 BESANT v. COX. Argument.

Here we say the difficulty of ascertaining to whom the shares divested by the proviso pass under its terms is a circumstance which shews that its whole operation must be restricted. The recent case of *Olivant* v. *Wright* (1) clearly shews that the cases in the House of Lords have not absolutely overruled the old rule. In that case the operation of an executory devise was restricted in the way contended for by us here.

Cozens-Hardy appeared for the representatives of the child who died in 1851 without issue.

Glasse, Q.C., *Jemmett*, and *Phear*, for the representatives of the three children of *Sarah Cox* who had died leaving children:—

The rule known as the 4th rule in *Edwards* v. *Edwards* (2) is overruled by the decisions in *O'Mahoney* v. *Burdett* (3) and *Ingram* v. *Soutten* (4), and death without issue will be construed to mean death without issue at any time. This was always the natural meaning of the words, and the cases in the House of Lords establish that the natural meaning is not, except under special circumstances, to be departed from. Here there are no such special circumstances. *Olivant* v. *Wright* was a different case, for there there was a gift over of a child's share in the event of his leaving issue as well as in the event of his dying without issue.

Judgment.

MALINS, V.C.:—

By the first devise in the will it is perfectly plain that the gift was to the daughter for life, then to the husband for life, and then to the children of the daughter by the husband living at her decease—that is, at the time of the decease of the testatrix—their heirs and assigns, as tenants in common, so that no after-born children of the daughter could take.

Then comes this proviso, upon which the whole question turns: "Provided always, and my will further is, that in case any or either of my said grandchildren shall depart this life without leaving lawful issue, then and in such case I give and devise the parts or shares or part or share of them, him, or her so dying

(1) 1 Ch. D. 346.
(2) 15 Beav. 357.
(3) Law Rep. 7 H. L. 388.
(4) Ibid. 408.

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without leaving lawful issue as aforesaid of and in the said hereditaments and premises unto the survivors or survivor of them my said grandchildren that shall leave such lawful issue, and to their heirs and assigns for ever as tenants in common." Now this is open to two constructions. One is—and this has been contended for by Mr. *Glasse*, Mr. *Jemmett*, and Mr. *Phear*—that this is a proviso to come into operation whenever any of the grandchildren die, the consequence of which would be that every grandchild, including the present Plaintiff (who is the survivor of all the grandchildren), whether of the whole or part, is tenant in fee with an executory devise over to those who should die leaving lawful issue. Now, if this is intended to apply to the whole life of the devisees, the grandchildren, nothing can be more absurd than that, because they can none of them do anything with the property; they cannot sell it, they cannot settle it, they cannot mortgage it, they can do nothing with it during the whole of their lives; and then the gift over is not to the survivor, but only to those who die leaving issue. So that, suppose they are reduced to two, and one of the two dies without issue, the other living, the other cannot take, because there is no gift except to those who die leaving issue and that at the time of the death of the first child without issue. A more absurd will, in that view of the case, can hardly be made.

To that construction, therefore, I am entirely opposed. But then there is another construction, absurd as the will may be, which will do more justice, and which is in accordance with the rules of this Court, which say that in all cases of vesting properties you must make it vest absolutely as early as possible; and in all these gifts over, which have produced the inconsistency pointed out, when they are to be during the whole lives of the devisees, the rule is to cut them down and to make them operate as early as possible. Therefore, in the common case, the gift to a class of persons and the survivors or survivor of them means the survivors or survivor at the death of the testatrix. A gift for life with remainder to a class of persons and the survivors means those who survive the period of division on the death of the tenant for life. Now in this case the will was, "that in case any or either of my said grandchildren shall depart this life without leaving

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V.-C. M. 1877 BESANT v. COX. Judgment.

lawful issue," then the shares were to go over. There it is reasonable enough, because at the death of the daughter you can ascertain which are then dead with and which without issue; and so at that period you determine who are the objects of the testatrix's bounty.

It has been contended that the case of *O'Mahoney* v. *Burdett* (1) is opposed to these obvious and thoroughly settled rules of construction. Now *O'Mahoney* v. *Burdett*, as I read it, decides merely this, that wherever there is a gift in fee with an executory devise over upon the death of the first taker without issue, that gift over will take effect at the death of the devisee, unless a contrary intention appears by the will. But if upon the whole will the Court collects the contrary intention, it leaves it entirely open to the Court to put a construction upon it which will effectually carry into effect the obvious intention of the testatrix. Now what was the intention of this testatrix? Why, to give to her daughter and husband for life, with remainder to the children of the daughter by that particular husband, as a class of persons; but she thought to herself, some of them may survive, and some may not—some may die without leaving issue, and some may die leaving issue. As to those who die without leaving issue, their shares shall go over; as to those who die leaving issue, their shares shall remain. That is the obvious intention. It vests property at a much earlier period; it makes the property useful to the family who take it, instead of tying it up for an indefinite period, namely, during the whole of their lives it may be, without power of alienation. I collect, therefore, from this will the contrary intention to that in the will in the case cited, and therefore it is, in my opinion, taken out of the rule in *O'Mahoney* v. *Burdett*.

But a very recent case since *O'Mahoney* v. *Burdett*, viz., the case of *Olivant* v. *Wright* (2), which was decided by the Court of Appeal in November, 1875, has been cited, and, in my opinion, entirely supports the construction which I put upon this will, and is undistinguishable from it. Now what was the will in that case? It was this: "I give and bequeath unto my husband *James Nicholson* all my real and personal property, whether houses, land, or whatever else I am entitled to from my late aunt's estate, and

(1) Law Rep. 7 H. L. 388. (2) 1 Ch. D. 346.

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all other effects belonging to me, wheresoever they may be at the time of my decease, during his natural life, to receive all the rents, interest, and profits arising from them for his own use, and after his decease to be divided amongst my five children share and share alike, and if any of my children should die without issue, then that child or children's share shall be divided share and share alike among the children then living, but if any of my children should die leaving issue, then that child (if only one) shall take its parent's share, and if more than one, to be divided equally amongst them share and share alike." In that case it names the number of children, but in the present case it is indefinite—"all the children living at the death of the testatrix, and if any of my children shall die without issue." Now what was the construction put on the words "if any of my children should die without issue"? That was held to mean, if any of them should die in the lifetime of the tenant for life without issue; the consequence of which was that those who survived the tenant for life took absolutely, and the property could then be divided because the interests were absolute. No less than four Judges, Lord Justice *James*, Lord Justice *Mellish*, Lord Justice *Bramwell*, and Lord Justice *Brett*, gave judgment in that case, and they all were bound, as I am bound, by *O'Mahoney* v. *Burdett* (1). But *O'Mahoney* v. *Burdett* leaves the question open. Every will must be construed according to the intention of the testator, and I am satisfied on the language of this will, as the Lords Justices were in *Olivant* v. *Wright* (2), that the intention of the testatrix was not to tie up the devisees during the whole of their lives, rendering the property inalienable and comparatively useless as long as they lived, but only to tie it up till the time the division took place, namely, the expiration of the life estate. I entirely concur in the decision in *Olivant* v. *Wright*. I am unable to distinguish this case from it, and both on the authority of that case, and upon the old and settled rules of this Court, I am of opinion that the intention was to vest this property and make it alienable at the earliest possible moment, and I am of opinion that the property vested in such of the children as survived the parents whether they had or had not issue. The share of the infant child who

(1) Law Rep. 7 H. L. 388. (2) 1 Ch. D. 346.

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died before the death of the tenant for life will go over, so the division will be in fifths at the death of the tenant for life; the five children are absolutely seised in fee; the death without leaving issue I hold to mean in the lifetime of the daughter who was the surviving tenant for life. The declaration, therefore, will be that the property vested in fifths, without regard to whether the five had or had not issue. They are tenants in common in fee each of one fifth.

Solicitors for Plaintiff: *Pownall, Son, Cross, & Knott.*
Solicitor for Defendant: *Sowton.*

V.-C. M. 1877 *July* 26.

In re HASTINGS.
SHIRREFF *v.* HASTINGS.

[1876 H. 389.]

*Creditor—Administration—Specialty Debt—Rent—*32 & 33 *Vict. c.* 46.

Rent is a specialty debt within the meaning of the Act of 32 & 33 Vict. c. 46, and therefore a landlord has no preferential claim against the estate of a deceased tenant for rent in arrear at the death of the tenant as against the simple contract creditors.

Statement.

THIS was a creditors' suit for the administration of the estate of Vice-Admiral *Hastings*, who died intestate on the 21st of March, 1876.

The Plaintiff was the lessor of a house occupied by the intestate, in respect of which a year's rent, amounting to £105, was due at his death. The Defendant was the administratrix.

The estate was deficient, and the Plaintiff now moved that she might, in respect of the arrears of rent so due, be declared entitled to priority in payment over the simple contract creditors.

Argument.

Bristowe, Q.C., and *Whateley*, for the Plaintiff:—

The intestate died after 1870, and therefore, supposing rent to be simply a specialty debt, any claim to preference would be taken away by the Act of 32 & 33 Vict. c. 46, generally known as Mr.

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Argument.

Hinde Palmer's Act (1). But rent is not a specialty debt, though it is well settled that, as regards priority, it has the privileges of a specialty debt.

Its position has been well defined by a series of authorities. It is a right accruing by tenure: *Clough* v. *French* (2), and of equal degree to a specialty debt: *Thompson* v. *Thompson* (3); *Talbot* v. *Earl of Shrewsbury* (4). But it is not in fact a specialty debt, being incident to privity of estate and not to privity of contract: *Vincent* v. *Godson* (5), and therefore not within *Mr. Hinde Palmer's Act*, which applies only to those debts which are really specialty debts. Rent, as being incident to the tenure, never came within the cognizance of the Ecclesiastical Courts: *Williams* on Executors (6). A specialty debt is, on the contrary, a matter arising directly out of contract: *Price* v. *Moulton* (7). That the Act does not apply except in the case of actual specialty debts, appears from *Williams* v. *Williams* (8), where a judgment debt was held to be unaffected by it. It is also said that priorities are done away with by the 10th section of the *Judicature Act*, 1875; but *In re Coal Consumers Association* (9) shews that the position of landlords and tenants are not wholly assimilated in the cases of administration and bankruptcy.

Charles Browne, for the administratrix, was not called upon.

Judgment.

MALINS, V.C.:—

This is a case of considerable importance, and if I had entertained any doubt upon it I should have heard the administratrix.

(1) The enacting part of the Act is as follows:—

"In the administration of the estate of every person who shall die on or after the first day of January, one thousand eight hundred and seventy, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding."

(2) 2 Coll. C. C. 277.
(3) 9 Price, 464.
(4) Law Rep. 16 Eq. 26.
(5) 4 D. M. & G. 546.
(6) 7th Ed. p. 1010.
(7) 10 C. B. 561.
(8) Law Rep. 15 Eq. 270.
(9) 4 Ch. D. 625.

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[His Lordship then referred to the facts of the case, and continued:—]

Mr. *Bristowe* contends that he is entitled to priority. But if the landlord were simply entitled to rent under a covenant, the case would be within *Mr. Hinde Palmer's Act.* Mr. *Bristowe* has referred to *Talbot* v. *Earl of Shrewsbury* (1). But in that case I fully admitted that rent was a specialty debt, and I founded my judgment upon the fact that the debt in that case could not be said to be for rent.

All the cases cited go to shew that rent, though not a specialty debt, has all the privileges of specialty debts, and according to the former law, and supposing the *Judicature Act* not to have passed, the Plaintiff in this case would have been entitled to priority in respect of the amount claimed as due for rent.

But in the year 1869 Mr. *Hinde Palmer* did a great public service by securing the passing of an Act which I when in Parliament had in vain endeavoured to obtain. I had once passed it through the House of Commons, but did not succeed in inducing any peer to take it up. I am very glad that Mr. *Palmer* was fortunate enough to do away with an anomaly which ought to have been done away with long before.

Mr. *Bristowe* says that rent arises from tenure, and not because it is created by an instrument under seal. [His Lordship then referred to the terms of the Act, and continued:—] The Act speaks of various modes by which debts obtain priority, and then adds: "or is otherwise made or constituted a specialty debt." Rent is made or constituted by the law of the land a specialty debt. But in order to prevent any doubt as to the meaning, it expressly puts all creditors, as well specialty as simple contract, as standing in an equal degree. Therefore, if the case depended upon that enactment alone, it is clear that the object of the Act was to sweep away all distinctions between the different classes of creditors. But if there were any doubt as to its meaning, it is taken away by the 10th section of the *Judicature Act* of 1875.

Solicitors: *Rooper; G. E. Thomas.*

(1) Law Rep. 16 Eq. 26.

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WEST OF ENGLAND AND SOUTH WALES BANK *v.* NICKOLLS.

V.-C. M.
1877
June 28.

[1876 W. 374.]

Discovery—Redemption Suit—First and Second Mortgagees—Interrogatories—Particulars of Property.

In a redemption suit by a second mortgagee against the first mortgagee the Defendant is bound to state in answer to interrogatories not only the amount due upon his security, but also what securities he holds for his debt.

Statement.

THIS was an action for redemption filed by the *West of England Bank*, who were second mortgagees of certain property, against the Defendants, the *Gloucestershire Banking Company*, who were first mortgagees of the same property. The Plaintiff had filed interrogatories calling upon the Defendants to set forth a list and short particulars of all the securities which at the date of the institution of the action they held for their mortgage debt; and the particulars of any dealings by them with such securities since the commencement of the action; and also what sum of money was owing on their securities; and they further required particulars shewing how much was for principal, and how much for commission, interest, and costs.

The Defendants answered that part of the interrogatory in which they were asked to set forth the amount due for principal, interest, and costs, but declined to answer further. The Plaintiffs excepted to the Defendants' answer to the interrogatories, on the ground that they ought to have set forth whether they held any securities for their debt other than the securities held by the Plaintiffs, and what was the nature of such other securities, if any.

Argument.

Glasse, Q.C., and *Romer*, for the Plaintiffs:—

The Defendants refuse to set out what securities they hold for their debt. It may be that they have another security in addition to the security upon which our debt is charged. In that case we

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should be bound to redeem both securities, and we require to know what the securities are in order to decide whether it is worth our while to redeem. When a Defendant submits to answer, he is bound to answer fully, unless he can make out an exceptional case, viz., that the discovery sought is vexatious or oppressive. This has been laid down as the rule in many cases, of which *Marquis of Donegal* v. *Stewart* (1) and *Saull* v. *Browne* (2) are examples. The rule as to answering applicable to redemption suits is the same as for any other suits for account, and a Defendant in a redemption suit cannot refuse to set out in his answer his accounts as mortgagee: *Elmer* v. *Creasy* (3); *Brookes* v. *Boucher* (4). That principle is quite as applicable to the information we require, without which we cannot tell whether we ought to redeem or not.

J. Pearson, Q.C., and *Speed*, for the Defendants:—

The Plaintiffs may have a claim to know what amount is due on our mortgage, but he cannot have a right to see our deeds. A mortgagee is entitled to sit upon his deeds, just as much as the owner of an estate, and he is not to produce them until the mortgagor, or, as in this case, the second mortgagee, comes forward with his money and offers to pay the money due. It was held in *Chichester* v. *Marquis of Donegal* (5) that the mortgagees could not be ordered to produce the deed of settlement, or to give any discovery in relation to it. In that case Lord Justice *Giffard* said: "I take the rule of the Court, right or wrong, to be, that if a mortgagor executes a mortgage and hands over the title-deeds, he cannot see those title-deeds after the mortgage has become absolute without paying the mortgagee his principal, interest, and costs." And in *Vint* v. *Padgett* (6) it was held that where two mortgages of different estates were assigned to one mortgagee as a security for one gross sum, one estate cannot be redeemed without both being redeemed.

Glasse, in reply.

(1) 3 Ves. 446.
(2) Law Rep. 9 Ch. 364.
(3) Ibid. 69.
(4) 8 Jur. (N.S.) 639.
(5) Law Rep. 5 Ch. 497, 502.
(6) 1 Giff. 446; 2 De G. & J. 611.

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MALINS, V.C.:—

The *Gloucestershire Banking Company*, who are the Defendants here, are the first mortgagees of a property, which for my purpose it is quite sufficient to call *Blackacre*. The *West of England Bank*, who are the Plaintiffs, are the second mortgagees of *Blackacre* only, and, as second mortgagees, they have a right to redeem the *Gloucestershire Banking Company*. They have accordingly brought a redemption action—second mortgagees against first mortgagees. In that action they have put in interrogatories, and all agree that under such circumstances the first mortgagee is bound to say what he claims to be due to him for the purpose of enabling the second mortgagee to decide whether it is worth his while to prosecute the action for redemption. I proceeded upon that principle in the case of *Elmer* v. *Creasy*, because I find from the report of the case before me in the *Law Journal* (1), that I stated "I was not satisfied with the answer, which seemed to be evasive, inasmuch as it stated the existence of the lease of 1861, but omitted to state the amount of rent reserved by it." That is only a very short account of the judgment I gave. I believe my judgment was much fuller than that, but the ground of my decision was that the mortgagee was bound in a general manner to state what he believed to be due to him to enable the second mortgagee to decide whether it was worth while to redeem or not. In this case the Defendants either have or have not additional security besides *Blackacre*. It is perfectly clear that if they do hold two securities the mortgagor could not redeem one without redeeming the other. It is also equally clear that if the one security has been expressly mortgaged to them for a particular debt, and then there has been an equitable mortgage for another debt, neither the mortgagor, nor any one claiming under him, can redeem one property without redeeming both. They are entitled to hold all the property for their debt, and the mortgagor can only redeem upon paying all that is due. In this case they say there is £3093 due to them. If they hold no other security than that of which the Plaintiffs are second mortgagees, it may not be worth the while of the Plaintiffs to redeem. Rather than do so, they probably would dismiss their action with costs. But suppose, in addition to *Black-*

(1) 42 L. J. (Ch.) 807.

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acre, of which the second mortgagees are also mortgagees, the first mortgagee holds a security of *Whiteacre*, it may be that *Whiteacre* is worth all the money. Suppose, for instance, that *Whiteacre* is worth £4000, and the answer is, We claim to have due to us £3093, the security we claim is *Blackacre*, and also *Whiteacre*, situate at such a place and of such an extent—and I do not see why they should not say of what value—then the second mortgagee knows whether it is worth his while to redeem or not. If the value is not stated, he can make inquiries. He can say, *Blackacre* is worth less than I have got to pay, but, taking the two together, I shall be secure if I redeem the *Gloucestershire Bank*, and pay everything due to them. If the mortgagor paid them off the £3093, he would be entitled to take out of their hands every security they hold, and all rights which the mortgagor has are conferred on the second mortgagee.

Then, upon the point of convenience and inconvenience, what harm will it do to the first mortgagee to say whether he holds any other security than that on which the second mortgagee holds a lien? Mr. *Pearson* argued it as if it were a question of looking at his deeds. That is not claimed. I quite agree with the decision of Lord Justice *Giffard* in *Chichester* v. *Marquis of Donegal* (1), that without paying the mortgagee off a mortgagor has no right to look at the deeds, and I desire it to be understood that if the *Gloucestershire Bank* say, We have a security on *Blackacre*, of which you have also a security, and we have a security on *Whiteacre*, on which you tell me you have not a security, there is no right in the *West of England Bank* to look at any of the deeds; the *Gloucestershire Bank* have a right, to use a common expression, to sit on their deeds; but there is a very great convenience in carrying the principle upon which *Elmer* v. *Creasy* (2) was decided to the extent of saying that the mortgagee must disclose whether he holds any other security than that which the second mortgagee holds, for the same reason, to enable the second mortgagee to decide whether it is worth his while to redeem or not. I think that is borne out by the judgment of Vice-Chancellor *Wood* in *Brookes* v. *Boucher* (3), where the suit was

(1) Law Rep. 5 Ch. 497, 502. (2) Law Rep. 9 Ch. 69.
(3) 8 Jur. (N.S.) 639.

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to establish breaches of trust, and where it was no use going on with the suit if the trustee had left no estate to answer the breaches of trust. Therefore the Defendants were bound to state in general terms what the amount of the estate was, to enable the Plaintiff to decide whether he would go on with the suit or not.

Elmer v. *Creasy* went before the Court of Appeal, and the decision of the Court was given by Lord *Selborne*, who, in his judgment, puts this qualification, which I am bound to follow, and which I do follow. He says (1): "We are not now called upon to determine whether the Defendant must, in answer to these interrogatories, set forth as full and detailed a statement of all the items of the account as he might be obliged to give under a decree for redemption. The Court may be trusted to exercise a proper control over any attempt on the Plaintiff's part to press for any such minuteness of discovery as would be either vexatious or unreasonable, as indeed it can do in every case in which it is satisfied that any kind of discovery is required vexatiously or oppressively: *Reade* v. *Woodrooffe* (2). But the present question is, whether the Defendant is entitled to refuse to answer at all before decree as to these matters? The Vice-Chancellor has decided that he is not, and with that decision we agree. The appeal must be dismissed with costs." Therefore I only go a little further in saying that, for the reasons I stated, it is a matter of convenience to the second mortgagee to know not only the amount due, but also the securities held, and I am unable to see that it can be of the slightest disadvantage to the first mortgagees. I do not accede to the application that they are bound to set out the minute details of the account, nor state the value of the property; but I think they are bound to state the security they hold. Suppose they hold a bond, if they say we hold a security on the same property as you, and, in addition to that, we have the bond of *A. B.* for a certain amount—if they know *A. B.* they can estimate the value; and if they do not, they can inquire who *A. B.* is, and when they find out, it may be worth their while to redeem. Therefore it seems to me, upon principle, that the summons is right. What is the form of the summons?

(1) Law Rep. 9 Ch. 73. (2) 24 Beav. 421.

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Glasse:—For a further and better answer, but, according to your Lordship's judgment, it goes too far. I propose to put it generally that the Defendants are to set forth what security they hold, and that the costs should be costs in the cause.

MALINS, V.C.:—I think that is fair, as you were partly successful and partly unsuccessful. Besides which, the summons raises a point that does not seem to have been very distinctly decided anywhere.

Solicitors for Plaintiff: *Clarke, Woodcock, & Ryland.*
Solicitors for Defendants: *Vizard, Crowder, & Anstie.*

V.-C. M. 1877 *July* 22, 31.

In re MICHELL'S TRUSTS.

Settlement—After-acquired Property—Covenant—Change in State of a Fund—Contingent Interest falling into Possession—Words pointing to Futurity.

By an antenuptial marriage settlement the intending husband covenanted that in case at any time during the joint lives of the husband and wife any future portion or real or personal estate whatsoever exceeding a specified sum should come to or devolve upon the wife, or the husband in her right, by or under the will of a person named, or by or under any other will, donation, or settlement, or by any person dying intestate, or otherwise howsoever, and whether in possession, reversion, remainder, contingency, or expectancy, the husband and all other necessary parties would from time to time effectually settle or concur with the wife in all reasonable acts and deeds effectually to settle all such future portion, real or personal estate, in manner therein mentioned:—

Held, that a fund to which at the date of the settlement the wife was entitled contingently on the happening of two events which happened during the coverture was bound by the covenant.

Statement.

THIS was a petition for payment out of Court of a fund paid in under the *Trustee Relief Act*.

William Michell, by his will, dated the 25th of March, 1825, after specifically devising certain real estate, devised and bequeathed all the residue of his estate and effects to trustees upon trusts for sale and conversion and investment, and for payment of the income to his wife, *Sally Michell*, during her life, and after her decease, as to one equal third part, upon trust for and to pay, assign, and transfer the same to his brother, *John Henry Michell*,

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in case he should be living at the decease of the testator's wife, but if his brother should have died in the lifetime of the testator's wife, he directed that his trustees should stand possessed of the same one-third share in trust for all and every the children of *John Henry Michell* living at the time of the decease of his wife, to be equally divided between them share and share alike, and if there should be but one such child, then in trust for such only child, the shares in or the whole of the third share (as the case might be) to be paid, assigned, and transferred to such of the said children, or such only child, in manner therein mentioned.

William Michell died on the 22nd of May, 1840.

John Henry Michell had an only child, *Margaret Henrietta*. By a settlement made upon her marriage with *Francis John Swaine Hepburn*, which was dated the 2nd of July, 1842, certain funds to which she was then entitled expectant upon the death of *John Henry Michell* and *Margaret* his wife were settled upon trusts for her for life, and then for the husband for life, and after the decease of the survivor of them, upon trusts for the children of the marriage, and in default of children, upon trust as to one moiety for the persons who would have been entitled under the Statutes of Distribution if Mrs. *Hepburn* had died unmarried, and as to the other moiety, upon such trusts as Mrs. *Hepburn* should by will appoint, and in default of appointment upon the trusts of the settlement. And the settlement contained a covenant by the husband "that in case at any time during the joint lives of the said *Francis John Swaine Hepburn* and *Margaret Henrietta Hepburn* any future portion or real or personal estate whatsoever exceeding at one time in value £300 shall come to or devolve upon the said *Margaret Henrietta Hepburn*, or upon the said *Francis John Swaine Hepburn* in her right, by or under the will of the said *John Henry Michell*, or by or under any other will, donation, or settlement, or by any person dying intestate, or otherwise howsoever, and whether in possession, reversion, remainder, contingency, or expectancy, the said *Francis John Swaine Hepburn* and all other necessary parties will from time to time effectually settle or concur with the said *Margaret Henrietta Hepburn* in all reasonable acts and deeds effectually to settle all such future portion, real or personal estate, upon the same trusts and with and

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subject to the same powers and provisions as are hereinbefore declared and contained concerning the said trust moneys and securities hereby settled, or as near thereto as by the deaths of parties and other contingencies shall be then subsisting and capable of taking effect, and as if the same future property were included and settled in and by this indenture and being real estate were directed to be converted into personal estate."

Mrs. *Hepburn*, by her will, dated the 10th of April, 1843, in express exercise of the power of appointment contained in the will, appointed that in case she died in the lifetime of her husband and left no child by him who under the trusts of the settlement should become entitled to the trust moneys and securities comprised therein, then after the decease of the survivor of her father and mother and after her own decease the trustees of the settlement should stand possessed of one moiety or equal half part of and in the trust moneys and securities comprised in the settlement and the annual produce thereof, and one moiety or equal half part of and in all such future portion or real or personal estate as should or might be assigned to the trustees of the settlement under or by virtue of the covenant of her husband, in trust for her husband, his heirs, executors, administrators, or assigns, for his own use.

John Henry Michell died on the 10th of March, 1844, leaving Mrs. *Hepburn*, his only daughter, surviving him.

Margaret Michell, Mrs. *Hepburn's* mother, died on the 21st of September, 1849, and *Sally Michell*, the widow of *William Michell*, died on the 15th of July, 1858.

Mrs. *Hepburn* died without issue on the 29th of May, 1859, and administration with her will annexed was shortly afterwards granted to her husband.

Mr. *Hepburn* died on the 28th of March, 1863, having appointed executors, who subsequently proved his will.

The money now in Court represented the third share of Mrs. *Hepburn* in the residuary estate of *William Michell*.

Argument.

Glasse, Q.C., and *W. King*, for the Petitioners, who were the executors of the husband:—

The words of this settlement point to futurity only, and do not

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contain expressions such as there were in the covenant in *Archer* v. *Kelly* (1), by virtue of which a change in the condition of the property from expectancy to possession brought it within the covenant. When the words of the covenant point simply to futurity, such a change of condition does not of itself bring a fund within the settlement: *In re Pedder's Settlement Trusts* (2), which has been followed lately in *In re Jones' Will* (3) by the Master of the Rolls in preference to *In re Viant's Settlement Trusts* (4). *Cornmell* v. *Keith* (5) was decided on the ground that the frame of the covenant included present as well as future interests of the wife.

[MALINS, V.C.:—There was a case of *Agar* v. *George* (6), which came before me recently, in which the effect of these covenants was considered.]

In that case the frame of the covenant pointed to a present as well as future interest in property, and it was decided upon the authority of *In re Mackenzie's Settlement* (7).

The result of the authorities is, that a contingent reversionary interest in property to which the wife is entitled at the date of the settlement is not bound by a covenant containing words pointing only to futurity merely by falling into possession during the coverture.

J. Pearson, Q.C., and *Whitehorne*, for some of the next of kin of Mrs. *Hepburn* as representing the whole class, who were numerous:—

It is plain upon the authorities that this interest is included in the covenant. The case is distinctly within *Archer* v. *Kelly* and *In re Hughes' Trusts* (8), which were followed by Vice-Chancellor *Wickens* in *In re Clinton's Trusts* (9). The question is whether there was not such a change in the condition of the property during the coverture as brought it within the covenant.

The object of covenants of this kind is to sweep into a settle-

(1) 1 Dr. & Sm. 300.
(2) Law Rep. 10 Eq. 585.
(3) 2 Ch. D. 362.
(4) Law Rep. 18 Eq. 436.
(5) 3 Ch. D. 767.
(6) 2 Ch. D. 706.
(7) Law Rep. 2 Ch. 345.
(8) 4 Giff. 432.
(9) Law Rep. 13 Eq. 295.

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ment every possible interest, and that intention would be defeated if this fund was considered not to be included.

Ilbert, and *Northmore Lawrence*, for other members of the same class, were not heard.

Dibdin, for the trustees.

Glasse, in reply, referred to *Wilton* v. *Colvin* (1) and *Atcherley* v. *Du Moulin* (2).

Judgment.

July 31. MALINS, V.C., after referring to the facts above set forth, continued:—

Upon this subject of covenants to settle future property many authorities were cited and commented upon by Mr. *Glasse* and Mr. *King* for the Petitioners, and also on the other side by Mr. *Pearson* and Mr. *Whitehorne*. I have carefully considered all these authorities, and I cannot say that I consider that they are all of them founded on very sound principles, but I think it may be said that the result of them is this: In *In re Pedder's Settlement Trusts* (3), which was decided by Lord Justice *James* when Vice-Chancellor—and though I am bound to say that I think the principle decided does not effectuate the intention of the contracting parties, there is no doubt that it was perfectly consistent with the preceding authorities—the intended wife and husband severally covenanted with the trustees that in case the marriage should be solemnized, all the estate, property, and effects, both real and personal, which the husband and wife, or either of them in right of the wife, should at any time or times during the said intended coverture become seised or possessed of or entitled to should be settled. At the date of the settlement and of the marriage the wife was entitled to a vested remainder in land expectant on the death of a tenant for life who outlived the coverture, and therefore, no doubt, the wife was to a certain extent entitled at the date of the settlement, but she was not entitled in possession, and I cannot

(1) 3 Drew. 617. (2) 2 K. & J. 186.
(3) Law Rep. 10 Eq. 585.

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help thinking that the intention of the contracting parties was to affect all property which might fall into possession during the coverture. However, Vice-Chancellor *James*, in strict conformity, I am bound to say, with the decisions up to that time arrived at, says (1): "I think this case is virtually decided by authority. The words of the covenant are words of futurity: 'shall during the coverture become seised or possessed of or entitled to;' and I find nothing to warrant a departure from the literal and natural meaning of the words. This is not property with regard to which it can be averred that the husband or the wife did become 'seised or possessed of or entitled to it during the coverture.' No seisin, no title accrued to either of them in respect of it during the coverture; hence the property does not satisfy the words of futurity in the covenant, and consequently was not included within it."

Now if this had been the same case, of course I should have felt myself bound by that authority; for although in a subsequent case before Vice-Chancellor *Bacon*, namely, *In re Viant's Settlement Trusts* (2), it was held that property to which the wife was entitled on the marriage was bound by a covenant; the Master of the Rolls, in a subsequent case of *In re Jones' Will* (3), has expressed his dissent from that decision. Probably as the authorities then stood, the decision of Vice-Chancellor *Bacon* was hardly consistent with the decided cases, although in principle I am bound to say I think he was right. *In re Jones' Will*, a decision of the Master of the Rolls last year, was the case of a marriage settlement, by which the intended husband and wife severally covenanted with the trustees that all the real and personal property (if any) not thereinbefore settled to which the wife or the husband in her right should at any time or times during the intended coverture become beneficially entitled in possession or reversion, or in any manner whatever derivable directly or indirectly from *J.*, should be settled as therein mentioned. At the date of the settlement and of the marriage the wife was entitled to a fund bequeathed by *J.* subject to the life interest of a person who outlived the wife, and it was held that the fund was not subject to the covenant, and the head-note to the case adds, "*In re Viant's Settlement Trusts*

(1) Law Rep. 10 Eq. 588. (2) Law Rep. 18 Eq. 436.
(3) 2 Ch. D. 362.

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not followed." There the Master of the Rolls says (1): "I must add one more decision to the numerous decisions on this question. I regret that a point which in the case of *In re Pedder's Settlement Trusts* (2) was said by the Judge to be virtually decided by authority, should again have become open to discussion in consequence of the decision of Vice-Chancellor *Bacon*. The covenant provides that any property shall be settled to which the wife, or her husband in her right, should at any time or times during the coverture become beneficially entitled in possession or reversion, or in any manner whatever derivable directly or indirectly from a particular source. Inasmuch as the tenant for life outlived the wife, it is clear that she did not, nor did her husband in her right during the coverture, become entitled in possession to a fund, which was hers in reversion before the marriage took place. It is equally clear that the husband during the coverture did not become entitled in right of his wife. His title accrued, not during the coverture, but afterwards, when he took out administration to his wife's estate. The sort of inchoate title that he had during the coverture depending on the possibility of the property falling into possession during the coverture really amounts to no title at all. Property such as this is not property to which the husband or the wife became entitled during the coverture. This was settled until the case of *In re Viant's Settlement Trusts* (3), which is quite the other way. With the greatest respect to the learned Vice-Chancellor, I must decline to follow that case. I hold that the fund is not subject to the covenant." If this had been the same case I should have felt myself bound by *In re Pedder's Settlement Trusts* and *In re Jones' Will* (4), although in principle I should be very much inclined to agree with Vice-Chancellor *Bacon* in his decision in *In re Viant's Settlement Trusts*.

There are three other cases which were referred to. One is a decision of my own in *Agar* v. *George* (5). I have looked at that decision, and I see no reason to doubt that it was correct, because I find that I followed *In re Mackenzie's Settlement* (6), a decision of Lord Justice *Cairns* and Lord Justice *Turner*; and also I think

(1) 2 Ch. D. 364.
(2) Law Rep. 10 Eq. 585.
(3) Ibid. 18 Eq. 436.
(4) 2 Ch. D. 362.
(5) 2 Ch. D. 706.
(6) Law Rep. 2 Ch. 345.

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that upon the words of the will my decision was perfectly warranted. That was a contingent interest. It was a post-nuptial settlement; the husband covenanted to settle any property which the wife, or he in her right, either then was or at any time during the coverture should become entitled to, and I held that a contingent interest in a fund standing in Court to the credit of a cause which fell into possession after the termination of the coverture was bound by the covenant. The words there were to settle all property to which the wife was then entitled. I drew the distinction, and said it was evidently intended to include all property in which the wife had any interest, vested or contingent, but was accidentally omitted.

That also was the decision in *In re Mackenzie's Settlement* (1). There the covenant was to settle property to which the wife then was or should become entitled at any time during the coverture, and it was held by the two Lords Justices that the land and property of the wife to which she was entitled at the date of the settlement was bound by that covenant.

There was another authority which was mentioned, namely, that of *Cornmell* v. *Keith* (2), a decision of Vice-Chancellor *Hall*, in which the facts fall strictly within my decision following that of the Lords Justices in *In re Mackenzie's Settlement*, because there being a covenant to settle property to which the wife then was or should at any time become entitled, the Vice-Chancellor held that it bound property in which the wife had then a contingent interest; but he made an observation with which I entirely concur, although it was not necessary for the decision of that case, as there was a covenant to settle all property to which the wife was then entitled. He says (3): "I may take this opportunity of stating that I am by no means disposed to put a narrow construction upon covenants like this. Conveyancers have struggled to make them sweep in every kind of property, and the form of the covenant has from time to time been added to to accomplish that object."

But the decision which I intend to follow on the present occasion, and which seems to me to rest on the soundest principle, is a decision of Vice-Chancellor *Kindersley* in *Archer* v. *Kelly* (4). That

(1) Law Rep. 2 Ch. 345.
(2) 3 Ch. D. 767.
(3) 3 Ch. D. 773.
(4) 1 Dr. & Sm. 300.

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was a case in which the wife was entitled at the date of the settlement "to a contingent interest in remainder in real estate, and was also entitled in possession to two sums of stock." That is a remarkable distinction, because the Vice-Chancellor held that with regard to the contingent interest in the real estate it was bound by the settlement, but the property to which she was entitled absolutely in possession was not bound, and the distinction he draws is this: He says (1): "Now the language in this settlement is, 'shall by gift, descent, succession, or otherwise howsoever become entitled to.' The word 'become,' in its usual and proper acceptation, imports a change of condition, that is, the entering into a new state or condition by a change from some former state or condition. The word 'entitled' may mean entitled in possession or entitled in reversion or remainder. And whereas at the time of the marriage the wife was entitled to the property called *Fieldings* in remainder expectant on the death of a tenant for life, the tenant for life having died during the coverture the wife thereupon became entitled in possession. And whereas at the time of the coverture her interest was contingent on the event of the tenant for life dying without a son. That event having happened during the coverture, she has become entitled to a vested estate; there is a change in the condition of her estate or interest in the property; she has during the coverture become entitled to the property for a new estate or interest, and therefore this property falls within the terms of the covenant. The plain and natural import of the terms of the covenant has been complied with. *Jane Rashleigh* has, by succession or in some other manner, become entitled to the property during the coverture."

Now every word of that will apply to the present case. I have already stated that at the time of the settlement in 1842 the wife could only have become entitled to this property on two events happening in her favour, first, that her father should die in the lifetime of *Sally*, the wife of the testator, which he did; and, secondly, that she should be a child of her father living at the death of *Sally*. I have already mentioned that both those events happened; but inasmuch as she became entitled during her coverture, and, as I pointed out, in 1858 all the events had

(1) 1 Dr. & Sm. 304.

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happened, she then became entitled to the property in possession. Therefore, upon those contingent events, the change in the condition, in the language of Vice-Chancellor *Kindersley*, took place, and therefore she became entitled to the property. Therefore, in my opinion, that brings it within that decision, and is, in my opinion, in accordance with all the decisions on the subject. I therefore on these grounds come to the conclusion that the property in question was bound by the settlement of 1842. The consequence of that is that Mr. *Glasse's* client will take one moiety of the fund in Court instead of the whole.

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Solicitors: *Dunster; Bridges, Sawtell, & Co.*

In re WEDGWOOD COAL AND IRON COMPANY.

V.-C. M. 1877 *Aug.* 7.

Joint Stock Companies Arrangement Act, 1870 (33 & 34 *Vict. c.* 104)—*Reconstruction Scheme—Debenture Holders—Title to vote at Meeting—Bona fides.*

Where a reconstruction scheme was resolved upon at a meeting of debenture holders under the Act of 1870, the Court *held* that the holders of debentures passing by delivery were not entitled to vote unless they produced their debentures at or before the meeting:

Held, also, that the Court would not sanction a reconstruction scheme resolved upon by a majority of debenture holders, if it should appear that persons voting in favour of the scheme were not acting *bonâ fide* in the interests of the debenture holders.

THIS was a petition to obtain the sanction of the Court to a scheme under the *Joint Stock Companies Arrangement Act*, 1870, for the reconstruction of the *Wedgwood Coal and Iron Company, Limited.* Statement.

The company was formed in 1872 for the purpose of working a colliery in *Staffordshire* held under the *Chatterley Iron Company.* The nominal capital was £200,000, in 20,000 shares of £10 each. Of these shares 15,000 were fully paid-up shares, and the debenture capital of the company, which constituted the working capital, amounted to £75,000, in 3000 debentures of £25 each.

In August, 1875, a resolution was passed that the company

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Statement.

should be wound up voluntarily, and on the 19th of November, 1875, the winding-up was ordered to be continued under supervision. A scheme was then proposed for the reconstruction of the company under the *Joint Stock Companies Arrangement Act*, 1870 (33 & 34 Vict. c. 104), and meetings of the creditors were arranged with the sanction of the Judge in Chambers, when it was decided that such meetings should be presided over by the official liquidator, Mr. *Smart*. The meeting of the creditors, other than debenture holders, was held first on the 10th of May, 1877, and a resolution was then passed unanimously, approving of the proposed scheme of reconstruction.

A second meeting took place on the same day, of the debenture holders, and upon a resolution being proposed for approving of the scheme, the numbers of persons present or by proxy who voted for the resolution were sixty, and those against the resolution were fifty-five. A scrutiny subsequently took place, and it appeared from the report of the official liquidator that of the persons present at the meeting who had voted for and against the resolution many had not produced their debentures before the meeting, and could not produce them at the meeting, and there were also others who had claimed on their bonds prior to the 10th of May, the day of the meeting, but who only produced them after that day, and if these persons were not properly qualified to vote at the meeting, then the numbers in favour of the resolution would amount to forty-three, while the numbers against the resolution would be forty-six. The question therefore was, whether those persons who were debenture holders on the 10th of May and produced their debentures, were alone capable of voting, or whether persons who voted at the meeting might afterwards qualify themselves as bondholders by the subsequent acquisition of debentures. It was also reported that in either view of the case there was a majority of three-fourths in value in favour of the scheme, there having been £60,000 in value of debentures represented at the meeting, of which amount the holders of £48,075 voted for the proposed scheme, and of £12,475 against the scheme.

Argument.

J. Pearson, Q.C., and *Whitehorne*, in support of the petition:—

The reconstruction scheme has been supported by so large a

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body of the debenture holders and shareholders, that there is no doubt of its being for the benefit of the company that the scheme should be carried through. It is the only way to make the undertaking profitable. The colliery is now being worked by the official liquidator. It is by his account paying its way, but more capital is required to make it profitable. In fact it is a choice between reconstruction and absolute destruction. In order to obtain the sanction of the Court to a reconstruction scheme under the *Companies Arrangement Act* (33 & 34 Vict. c. 104), it is only necessary to have three-fourths in value of the debentures held by persons present at the meeting. This was decided in *In re Bessemer Steel and Ordnance Company* (1) and in *In re Tunis Railways Company*, before your Lordship on the 22nd of May, 1874, affirmed by the Lords Justices, July 11, 1874. Here we had more than three-fourths in value in favour of the scheme, and we also had a majority of the persons actually present, and so long as they were able to produce their debentures when the scrutiny took place, that is sufficient to render their votes valid.

Bristowe, Q.C., and *Nicoll*, for the majority of creditors and debenture holders in the same interest.

Glasse, Q.C., and *Romer*, for the official liquidator.

Higgins, Q.C., and *Everitt*, for debenture holders who opposed the scheme:—

We object to this scheme because it is opposed to the interests of the debenture holders. The majority at the meeting was obtained by dividing the debentures and giving a single bond to some of the large shareholders who were present at the meeting and who are interested in escaping from their own liability to the prejudice of the debenture holders. But we contend that the nominal majority at the meeting which took place on the 10th of May did not represent the persons really interested in the question. There are now debenture holders to the amount of £12,475 who strongly object to the scheme, and all the original directors and promoters who are holders of shares are supporting it in order to

(1) 1 Ch. D. 251.

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get rid of their liability. The intention of the promoters of this reconstruction will be best understood by reference to a report of the facts in this case when it came before the Court in July, 1876, —*Anderson's Case* (1)—where it was decided that the holders of paid-up shares, having given no consideration for their shares, were liable to be placed on the list of contributories. This was upon the same principle as in *In re Heaton Steel and Iron Company* (2) and *Crickmer's Case* (3). The effect of the decision in *Anderson's Case* was to render Mr. *Anderson*, one of the promoters, liable for £35,000, Colonel *Innes* for £5000, and other persons in the same position for very considerable sums of money. By the present scheme those shareholders will get rid of those heavy liabilities, to the ruin of the debenture holders. It is true that at the meeting of the debenture holders there was a majority of persons present who voted for the scheme; but as this was contrived by distributing single debentures to the shareholders after they had voted at the meeting, we contend that their votes were invalid; and we also contend that the resolution was carried by persons who, as shareholders, were not acting *bonâ fide* for the interests of the bondholders, but for the purpose of escaping from their own liability as shareholders.

The Court has never sanctioned a reconstruction scheme if there has been a large minority of persons opposed to it. In the case of the *Western of Canada Oil, Lands, and Works Company* (before the Master of the Rolls, June 20, 1874), there was no opposition to the scheme, and the rights of the debenture holders were strictly preserved. In *In re Tunis Railways Company* only two debenture holders opposed.

The principle is the same as that which is acted upon in bankruptcy. In the case of *In re Page* (4) the creditors of a debtor resolved to accept a composition of 1s. in the pound to be paid in twelve months, but upon the opposition of a single creditor the Court refused to allow the resolutions to be registered. The same principle was acted upon in *Ex parte Cowen* (5) and *Atwool* v. *Merryweather* (6). The case of *Menier* v. *Hooper's Telegraph*

(1) 34 L. T. (N.S.) 943.
(2) 4 Ch. D. 140.
(3) Law Rep. 10 Ch. 614.
(4) 2 Ch. D. 323.
(5) Law Rep. 2 Ch. 563.
(6) Ibid. 5 Eq. 464, n.

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Works (1) is exactly in point here, for the Court in that case interfered to protect the minority of a company where the majority proposed to benefit themselves at the expense of the minority. On these authorities the Court would be justified in refusing to sanction the scheme, even if there were a majority, because we shew that the majority were acting with a view to benefit themselves at the expense of the minority.

Locock Webb, Q.C., and *Fellows*, for the trustees.

J. Pearson, in reply, referred to *Waterhouse* v. *Jamieson* (2).

MALINS, V.C.:— Judgment.

The *Wedgwood Coal and Iron Company*, so far as I have had an opportunity of knowing, on the many occasions in which the affairs of the company have been before me, was an undertaking which originally possessed the elements of success, but I am sorry to say that the practice was had recourse to of giving the appearance of shares having been paid up in full upon which nothing had in fact been paid, and various schemes were resorted to which were, in my opinion, quite certain to bring the company to destruction, and they have accordingly done so. It has come to be wound up, and in the winding-up, although I have appointed an official liquidator, who up to this time has conducted the matter exceedingly well, the operations have resulted in this, that it barely pays its way in the present state of things, though it may do much more than that if prosperity should be restored to the coal and iron trades.

In this state of things, there being a large amount of debt—no less than £60,000 in round numbers on debentures or notes of hand passing by delivery, and common trade debts of about £5000, making together an indebtedness of at least £65,000—there are no assets whatever to pay the creditors of the company, either the debenture or trade creditors, unless money can be obtained from the shareholders, and if they are made to pay in full there may be assets sufficient to pay the trade creditors who stand behind the debenture holders. It appears that there is a large number of

(1) Law Rep. 9 Ch. 350. (2) Law Rep. 2 H. L., Sc. 29.

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shares on which not one farthing has been paid. Upon Mr. *Anderson*, who is one of such shareholders, I have fixed a liability, under my order of the 15th of July, 1876, to pay £35,200 on 3220 shares. Colonel *Innes*, I have also decided, is liable to pay an amount of between £700 or £800, so that there is about £36,000 due from those two gentlemen alone, and I understand there are many other shareholders who have not yet paid, and by whom a large sum of money ought to be paid to meet the liabilities of the company.

[*Higgins*:—Not one single shilling has ever been paid upon any share before or after the liquidation.]

Well, that is a lamentable state of things, but not more so than we are in the habit, in this Court, of constantly witnessing. However, the company being carried on by the official liquidator without a loss—probably only at a small profit—and while the company was being nursed, as I may say, for better times—while this was going on a certain number of shareholders and creditors proposed a scheme of reconstruction, which is a very common thing when companies of this kind get into difficulties, with a view of turning that into prosperity which is only a state of disaster. In many instances it has been done with great success, and it is very desirable when practicable that such a course should be adopted. Accordingly a large number of shareholders and debenture holders thought it desirable that a scheme for the reconstruction of this company should be adopted, and a petition for that purpose was presented in the month of February. The scheme was discussed in Chambers, and I am far from being satisfied that if that scheme were adopted it would not be greatly for the benefit of all parties concerned. I think I can see plainly that if Mr. *Anderson*, and Colonel *Innes*, and all the other persons who are said not to have paid upon their shares, are able to pay, and are compelled to pay, it may be that the concern would do very well, because it is said there would then be the requisite amount of capital to go on with the working; but I have been assured by those who represented Mr. *Anderson* and Colonel *Innes* that they cannot pay, and therefore it seems to me to be rather a forlorn hope for the debenture holders to expect to get

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money to meet their debentures, either by carrying on the works or rejecting the scheme for reconstruction.

When the scheme was proposed the usual steps were taken in Chambers to ascertain the opinion of the shareholders and creditors. A meeting was fixed and a chairman was appointed. The meeting accordingly took place on the 10th of May last in *London*, and I am now asked to sanction the resolution which is said to have been passed at that meeting in favour of the scheme by the necessary majority of votes of creditors and shareholders; but really the only persons interested in arguing it before me are the creditors holding debentures, who, according to law, are entitled to stand before all the other creditors, and to sweep away every part of the property to the detriment of the general creditors. I have not gone into the particulars of the reconstruction scheme, because the only question I have now to consider is whether the resolution passed at the meeting which was held is such as to be binding upon all the parties. Now although these companies are formed under the *Companies Act*, 1862, yet these kind of questions mainly depend upon the Act of 1870, and that Act in the 2nd section says this: "Where any compromise or arrangement shall be proposed between a company which is at the time of the passing of this Act or afterwards in the course of being wound up, either voluntarily or by or under the supervision of the Court, under the *Companies Acts*, 1862 and 1867, or either of them, and the creditors of such company, or any class of such creditors, it shall be lawful for the Court, in addition to any other of its powers, on the application in a summary way of any creditor or the liquidator, to order that a meeting of such creditors or class of creditors shall be summoned in such manner as the Court shall direct"—all that has been done, as I have already said—"and if a majority in number representing three-fourths in value of such creditors or class of creditors present, either in person or by proxy at such meeting, shall agree to any arrangement or compromise, such arrangement or compromise shall, if sanctioned by an order of the Court, be binding on all such creditors or class of creditors, as the case may be, and also on the liquidator and contributories of the said company." In order, therefore, to make this order binding, there must be a majority of the creditors present—a majority in

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number and three-fourths in value of the interests must be represented; and it must be sanctioned by an order of the Court. Now it cannot be sanctioned by the Court unless the Court is satisfied that there has been the requisite majority, first of persons, and secondly of capital or debt.

The first question that arises is, has there been a majority of persons at a meeting duly convened who have passed this resolution? That the meeting was duly convened and duly held is not contested. Then was there the requisite majority? Upon that subject it is agreed that if only those debenture holders who had produced their debentures before the meeting or at the meeting are entitled to vote, instead of there being a majority there was a minority of persons; because I have the statement of the official liquidator that of the persons present on that occasion forty-three only voted for the resolutions while forty-six voted against them. If, therefore, the proper view of the case is, that only those who were debenture holders, and who proved themselves to be so at that time, were entitled to vote, it necessarily follows that the majority was against the resolutions, and the Court has no power of carrying them into effect.

But then it appears that these debentures pass by delivery, and certain persons who were present at that meeting, and had not produced their debentures before the meeting, and could not produce them at the meeting, were subsequently allowed to be added to the voting, that is, they were subsequently admitted as if they had voted at the meeting, and in that way Mr. *Smart* reported there were a number of debenture holders voting who had claimed on their bonds prior to the 10th of May, but who produced them only after that date; and there were also some debenture holders who both claimed on and produced their debentures on the 10th of May, and that makes up the number supporting the resolution to sixty. Adding the like classes together of those who voted the other way, it brings the number only to fifty-five, so that if these were all proper voters, then there were sixty in favour of the resolution and fifty-five against it, making the requisite majority in favour of the resolution as to persons, and it is not disputed that there was the requisite majority of three-fourths as to capital. But I am clearly of opinion that no voters are entitled

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to have any notice whatever taken of them unless they could legally and properly vote at the meeting of the 10th of May. If it were otherwise, in these cases of debentures passing by delivery, it would be a farce to have a meeting and admit subsequent voters who had neither produced nor proved their title to vote at or before the meeting, because the door would be open to all kinds of fraud. A man who was at the meeting might say, "I had my debentures, I did not bring them with me, but I have them with me now," whereas they might have been given to him afterwards. Every possible misrepresentation and fraud might be practised, and it is clearly the duty of the Court to prevent the adoption of any such practice. I am, therefore, bound on principle to reject every vote the title to which had not been proved at or before the meeting, and, adopting that principle, the result is that there is a majority against the resolution, because the numbers were forty-six against and only forty-three in favour of the resolution.

However, I should be sorry to decide the case simply on that narrow and technical ground, because I feel myself warranted in rejecting these resolutions on higher grounds than this. I think it is perfectly clear that all resolutions of this kind, whether they are resolutions by a majority of debtors to bind the minority, as in bankruptcy, or whether they are by a majority to bind a minority under any Act of Parliament, must be passed *bonâ fide* and without sinister objects; and when I find a meeting attended by such a debenture holder as Mr. *Anderson*, owing to the company £35,000 and upwards upon shares, and holding only one debenture for £25, what conclusion can I come to but that Mr. *Anderson* is anxious to support this scheme, because if he succeeds he is relieved from the payment of £35,000, and may only lose £25 as a debenture holder? Can I, under such circumstances, regard him as a disinterested voter? Can I do otherwise than regard him as going to the meeting to support these resolutions for any other object than to get rid of that liability which he incurred, according to my view, by a course of proceeding of a most improper character, by endeavouring to obtain shares as fully paid-up shares when he had not paid a penny for them. My opinion was, when his case came before me, that there was no justification whatever for his conduct, and I remain of the same opinion now.

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So in the same way with regard to Colonel *Innes*. He also is liable to pay a considerable sum of money, although it is insignificant compared with what Mr. *Anderson* has to pay, and he goes to the meeting for the purpose of getting rid of a very heavy liability as shareholder, and running a much smaller risk as a bondholder.

Now, on principle, I think the case of *In re Page* (1) is entirely applicable to this. That was a case in bankruptcy, and every one knows that three-fourths of the creditors in value can bind the minority. There, a butcher became a bankrupt, his assets consisted of £5 in cash and £371 in stock-in-trade, book debts, and so forth, and his debts were £1200, so that according to the statement laid before the creditors his assets were enough to pay 4*s*. or 5*s*. in the pound; but the statutory majority of creditors resolved to accept 1*s*. in the pound, payable by instalments during the year. What could this be? Not a *bonâ fide* regard for the interest of the creditors, but a mere favour shewn to the debtor or bankrupt. The Registrar in Bankruptcy has a right to decide whether a resolution shall be registered or not, and the registration of this resolution was opposed by Mr. *Beer*, a creditor for £50 12*s*. Mr. Registrar *Keene* refused to register the resolution, and his decision was affirmed by Mr. Registrar *Hazlitt*, acting as Chief Judge. The debtor appealed, his object being to get off the payment of his debts by paying 1*s*. in the pound by instalments extending over a year. The thing was ridiculous, in my opinion. However, there was the statutory majority of creditors, and according to the Act of Parliament it was binding, but Lord Justice *James* says: "Two Registrars in succession have come to the conclusion that these resolutions were not such that the majority of the creditors could reasonably and properly bind the minority by them. I agree in this conclusion. The Legislature has given great power to the majority, but it must be exercised *bonâ fide* in the interests of the creditors, and not from motives of kindness to the debtor. There must be a *bonâ fide* resolution by the creditors dealing as creditors. Here both the Registrars thought that the composition of 1*s*. in the pound was, having regard to the amount of the assets as shewn by the debtor's own

(1) 2 Ch. D. 323, 324.

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statement, a mere sham. I think so too. The appeal will be dismissed with costs." A similar point was decided in *Ex parte Cowen* (1), which was cited in that case.

Now, therefore, these cases shew distinctly that it is not enough merely to obtain the statutory majority. The Court, before it gives its sanction (without which the resolution cannot be acted upon), must be satisfied that the resolution has been carried *bonâ fide* by persons who really have regard to the interests of the company, and who have not voted merely for the purpose of exonerating themselves from a liability which they have incurred. I am well satisfied in this case that Mr. *Anderson* at least, and probably Colonel *Innes*, and I have no doubt many others, were not actuated in the vote they gave by a *bonâ fide* regard for the interests of the company, but gave those votes merely for the purpose of getting out of the liability which they had incurred, and incurred by a course of conduct, as to one of them, of a most improper description.

First, therefore, because there was not the statutory majority, and, secondly, because if there had been the statutory majority, constituted as it was, it could not be treated as a *bonâ fide* majority, I refuse to sanction the scheme as passed at those meetings. Consequently, I suppose another meeting must be held.

Higgins, Q.C., asked that the petition might be dismissed.

MALINS, V.C.:—I think the proper course is that the Petitioners should pay the costs up to the present time, including the costs attending the holding of the meetings, and the petition will then stand over, with liberty to the Petitioners to apply in Chambers for further directions as to the holding of any other meetings as they may be advised.

Solicitor for Petitioners: *J. Vernon Musgrave.*

Solicitors for other parties: *Mercer & Mercer; Lowless & Co.; Stibbard & Cronshey.*

(1) Law Rep. 2 Ch. 563.

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June 6, 8, 9, 10, 12.

MORGAN *v.* MINETT.

[1875 M. 240.]

Solicitor and Client—Gift—Influence.

To prevent the operation of the rule that a solicitor shall not take a gift from his client while the relation subsists, there must not only be a total absence of fraud, misrepresentation, or even suspicion, but there must be a severance of the confidential relation.

Statement.

THIS was a suit by the executors of the late Rev. *H. C. Morgan* for the administration of his estate, and for the purpose of setting aside certain releases given by him to the Defendant *Minett*, who was at the time his confidential solicitor, in respect of sums of money owing by *Minett* to the testator.

The testator, who was vicar of *Goodrich*, near *Ross*, in *Herefordshire*, and a country magistrate, succeeded, on the death of his brother, in 1864, to a large estate of real and personal property, with an income of £7000 a year. He was unmarried, and had no near relations, and up to this time had been a comparatively poor man.

The Defendant *Minett* was clerk to the magistrates in the division in which the testator acted, and in this capacity their acquaintance first commenced about 1855, since when he, *Minett*, acted as the testator's solicitor and agent, and had managed all his investments and business. They were on terms of close intimacy, and the testator, who was much attached to *Minett*, was in the habit of lending him money. Soon after coming into his brother's property the testator made the Defendant an allowance of £100 a year, and by his will and codicils, which were very numerous, he gave him various legacies, which were expressed to be "for his gratuitous and kind services during many years past," and also gave legacies to *Minett's* wife and children.

In September, 1874, *Minett*, at the testator's own spontaneous request, prepared two releases of the various sums which had been lent to him by the testator and by the testator's brother and predecessor in the estates, Mr. *Francis Morgan*, amounting in all

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to £3000. The releases, which were dated the 1st and 2nd of October, 1874, were executed by the testator and returned to *Minett*, who, considering, as he said, that the releases were given to him instead of additional legacies, told the testator that he should continue to pay interest upon the debts, and did so.

In the same month of October, 1874, upon the occasion of the execution of a further codicil, Mr. *Gwynne James*, a solicitor of *Hereford*, was called in at *Minett's* request, who explained that the testator, who was a very old friend and client, had by his will and various codicils given him and his family considerable benefits, and had also released him from some debts.

These transactions having been carried out without the intervention of any other solicitor, the Defendant stated that he was anxious that some solicitor totally unconnected with him should see the testator and explain to him fully what those transactions were, and if satisfied that the testator knew and fully understood what he had done, a codicil confirming the previously made will should be signed. Mr. *James* came over to *Ross* on the 9th of October, and, after being furnished with an epitome of the will and previous codicils, the releases and a statement of the benefits given by the testator to *Minett* and his family, prepared a codicil in Mr. *Minett's* office. This codicil, as originally prepared, with the exception of two small legacies to persons named *McClaverty*, was merely a confirmation of previous dispositions.

Armed with these documents, Mr. *James*, accompanied by Mr. *Minett*, went over to *Goodrich Castle*, the testator's residence, and there saw him alone. During the interview Mr. *James* went through the epitome and the new codicil very carefully with the testator, who pointed out one or two errors in names, and insisted upon the insertion of a legacy to a Mr. *Clark*, an old friend, and quite satisfied Mr. *James* that he thoroughly understood what he had been doing. One of the servants was called in, and in his presence and that of Mr. *James* the testator executed the codicil. Mr. *James* then called his attention specially to the fact that he had given *Minett* the releases of the 1st and 2nd of October, and asked him if it was his intention to release the debts in addition to the benefits he had already given *Minett* and his family. The testator replied that it was so, and satisfied Mr. *James* that the

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releases did represent his mind and wish. Mr. *James* then wrote at the foot of the epitome the following memorandum:—"The bequests made to the said *H. Minett* are in addition to a release given to him by deed dated the 1st of October, 1874, of a debt of £2100 due from him, and to a second release given to him by deed dated the 2nd of October, 1874, of a debt of £1000 due from him, with a reconveyance of the offices in *Ross* mortgaged for the last-mentioned sum"—and left this document with the testator. Mr. *James* also gave evidence to the effect that he found the testator during this interview very cheerful and intelligent for a person of his age, and perfectly competent to transact business, and that he expressed his gratitude towards *Minett*, and his wish to benefit him, and to adhere to the two releases he had already executed. Evidence was also given of conversations in which the testator spoke of *Minett* to others as well as to Mr. *James* in very affectionate terms, saying how much he appreciated his assistance and services, that he could not do without him, that he was entirely his right hand, and that he did not know what he should do if he lost him.

In February, 1875, the testator executed a release (also prepared by *Minett*) of a further sum of £500 due from him, making a total amount of £3600.

The testator died in July, 1875, aged eighty-four, and the Plaintiffs, who were relations and two of his executors (*Minett* being the third executor), sought in this suit to set aside the releases of October, 1874, and February, 1875, as having been executed by the testator while under the professional influence of *Minett*, and without proper independent advice.

Argument.

Kay, Q.C., *Willis*, Q.C., and *Nalder*, for the Plaintiffs:—

The releases in question, which are admittedly without consideration, were prepared by the Defendant himself during the continuance of the confidential relation of solicitor and client between the testator and himself, and without the intervention of any independent solicitor, and must therefore be set aside.

In the case of a purchase from a client the parties are at arm's length, and although the Court regards such transactions with great jealousy, and the *onus* is thrown upon the solicitor of shew-

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ing that everything was perfectly fair, and that no advantage was taken, there is no rule to the effect that a solicitor is absolutely precluded from purchasing his client's property while the professional relation exists. But in the case of gifts the rule is far more stringent and is absolute. So long as what has been termed "the crushing influence of the solicitor" exists, any transaction of gift is supposed to have been motived by that influence, and accordingly, from the extreme difficulty of shewing that everything was voluntary and fair, with full warning and with perfect knowledge, it is almost impossible, even where there is no ingredient of fraud, and however morally just the transaction, however deserving the particular recipient, that the solicitor can take any benefit from his client by way of gift: *Tomson* v. *Judge* (1); *Middleton* v. *Welles* (2); *Hatch* v. *Hatch* (3); *Lady Ormond* v. *Hutchinson* (4); *Wright* v. *Proud* (5); *Montesquieu* v. *Sandys* (6). If the connection has been severed in such a way as that the influence may be considered at an end and the parties are at arm's length, then a ratification, such as will be set up here, may be of some value; otherwise it is perfectly worthless: *Wood* v. *Downes* (7); *Holman* v. *Loynes* (8).

H. Matthews, Q.C., and *Blackmore*, for the Defendant *Minett*:—

The evidence shews that in giving these releases the testator was a perfectly free agent, under no pressure, influence, or even suggestion on the part of *Minett*, and actuated solely by feelings of gratitude and personal regard, encouraged, no doubt, by professional services, but engendered by a friendship of many years. All influences are not unlawful; motives of affection or gratitude for past services are perfectly legitimate, and may be fairly pressed: *Hall* v. *Hall* (9). The onus of proof in transactions of this kind is no doubt thrown upon the solicitor of shewing that he took no advantage of his professional influence, and dealt with his client exactly as a stranger would have done. But at most a suspicion attaches upon the transaction calling for minute examination:

(1) 3 Drew. 306.
(2) 1 Cox, 112; 4 Bro. P. C. 245.
(3) 9 Ves. 292.
(4) 13 Ves. 47.
(5) 13 Ves. 136.
(6) 18 Ves. 302.
(7) Ibid. 120.
(8) 4 D. M. & G. 270.
(9) Law Rep. 1 P. & M. 481.

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Harris v. *Tremenheere* (1); and the presumption of influence may be rebutted by circumstances short of the total dissolution of the relation of solicitor and client, which is only looked at as creating the influence: *Re Holmes' Estate* (2). But when the obligation upon the solicitor has been discharged, and it is shewn by separate and independent evidence that the gift was a voluntary and deliberate act, the result of the donor's free will, and coupled with the intervention of some indifferent person, there is nothing *ipso facto* in the relation of solicitor and client which makes it absolutely impossible for a solicitor to receive a gift from his client: *Hunter* v. *Atkins* (3); *Walker* v. *Smith* (4). In the last case, which we cite for the statement of the law, although legacies to a solicitor and his family were upheld, a gift failed as there was no evidence that the gift was really made. "If," says Lord *Romilly*, "she had called in a third person who had no interest in the matter, and said, 'I have deliberately given this £500 to Mr. *Smith* (the solicitor) for the benefit of himself and his children, or for his own benefit exclusively,' then I should have upheld the gift." In this case that ingredient is exactly supplied by the evidence of Mr. *Gwynne James*. The very strong remarks in *Tomson* v. *Judge* (5), that "the view of this Court is that the rule with regard to gifts is absolute; that it is not open to the attorney to shew that the transaction was fair; but that the gift cannot stand;" and further, those commenting upon Lord *Eldon's* view in *Harris* v. *Tremenheere* (6), are merely *obiter dicta*, and opposed to *Hunter* v. *Atkins* (7), and the general current of authorities.

A distinction is taken where the attorney is not attorney *in hâc re*: *Montesquieu* v. *Sandys* (8); *Edwards* v. *Meyrick* (9); and if not attorney in the particular matter, or if the cause in respect of which the gratuity is given be over, the liberality, however excessive, will not be set aside: *Oldham* v. *Hand* (10); *Newman* v. *Payne* (11); *Hindson* v. *Weatherill* (12). Consider the position of the testator, a warm-hearted, generous old man with a large pro-

(1) 15 Ves. 34, 40.
(2) 3 Giff. 337.
(3) 3 My. & K. 113.
(4) 29 Beav. 394, 398.
(5) 3 Drew. 306, 315.
(6) 15 Ves. 34.
(7) 3 My. & K. 113.
(8) 18 Ves. 302, 313.
(9) 2 Hare, 60.
(10) 2 Ves. Sen. 259.
(11) 2 Ves. 199.
(12) 5 D. M. & G. 301.

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perty and superabundant revenue which he did not and could not spend, with no near relatives having claims upon him, and there being nothing to render it imprudent, unadvisable, or even rash to give this bounty. What more natural than that, having a strong feeling of friendship for *Minett*—a source of kindness and preference altogether legitimate and pure—he should be minded to forgive him debts which *Minett* might have a difficulty in paying, and the payment of which was absolutely immaterial to the testator? Is the solicitor of such a man to be a pariah, outside human sympathies and regards, incapable of receiving bounty from him? "No law that is tolerable among civilised men—men who have the benefits of civility without the evils of excessive refinement and overdone subtlety—can ever forbid such a transaction, provided the client be of mature age and of sound mind, and there be nothing to shew that deception was practised or that the attorney availed himself of his situation to withhold any knowledge or to exercise any influence hurtful to others and advantageous to himself": *Hunter* v. *Atkins* (1). The gifts were the voluntary, unsuggested act of the testator; and that which has been always regarded as a very material element in these cases is not wanting. Mr. *Gwynne James*, an independent solicitor of eminence, was called in by *Minett's* advice, fully satisfied himself that the releases represented the testator's own free and unbiassed act, and did what was equivalent to giving him independent advice in the transaction. So long as the testator had the benefit of competent and independent advice in the matter, neither the age nor capacity of the person conferring the benefit, nor the nature of the benefit conferred, have any materiality in cases of this nature: *Rhodes* v. *Bate* (2).

Kay, in reply:—

It has been attempted to discredit the authority of Vice-Chancellor *Kindersley* in *Tomson* v. *Judge* (3), in which he contrasts Lord *Eldon's* own authority in *Hatch* v. *Hatch* (4) and other cases, following *Welles* v. *Middleton* (5), with his decision in *Harris* v. *Tremenheere* (6).

(1) 3 My. & K. 113, 135.
(2) Law Rep. 1 Ch. 252.
(3) 3 Drew. 306.
(4) 9 Ves. 292.
(5) 1 Cox, 112.
(6) 15 Ves. 34.

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We submit that the observations in *Tomson* v. *Judge* (1) are fully borne out by the authorities; but in any case *Harris* v. *Tremenheere* (2) turned upon a gift of leases, which is very distinguishable, as a lease, however beneficial, involves obligations and is rather in the nature of a purchase, and not like a mere gift of money or release of an existing debt; and the observations of Lord *Eldon* are addressed to dealings between solicitor and client in the case of purchase, which is clearly distinguished from mere bounty. *Hunter* v. *Atkins* (3) contains an accurate statement of the law as to transactions of sale and purchase between persons standing to each other in the relation of solicitor and client; but the observations of Lord *Brougham*, so far as he places gift and purchase upon the same footing, are too wide; and, moreover, in that case no confidential relation of solicitor and client existed between the parties.

In both *Walker* v. *Smith* (4) and *Re Holmes' Estate* (5), which have been cited for the *dicta*, the gifts were set aside, and those cases cannot assist the Defendant.

The cases shew clearly that while the relation of solicitor and client exists, and it cannot be said that the influence arising from that relation has been terminated, a solicitor cannot take from his client any gift or reward, and that there can be no valid security for such a gift in the course of their business; in other words, that a transaction of bounty cannot possibly be supported: *Newman* v. *Payne* (6); *Montesquieu* v. *Sandys* (7); *Rhodes* v. *Bate* (8). As stated in *Tomson* v. *Judge*, the law is that any transaction of gift flows presumably from the influence produced by that relation, and consequently is void in the eye of this Court, or, as stated in *Re Holmes' Estate* (9), "makes it almost impossible that the gift can prevail." Can it be said that the relation of solicitor and client was put out of the case completely; that the influence exercised by *Minett* over his client's mind was practically abrogated at the time he made these releases; that he had independent advice, which would operate as a guard and protection

(1) 3 Drew. 306.
(2) 15 Ves. 34.
(3) 3 My. & K. 113.
(4) 29 Beav. 394.
(5) 3 Giff. 337.
(6) 2 Ves. 199, 201.
(7) 18 Ves. 302.
(8) Law Rep. 1 Ch. 252.
(9) 3 Giff. 337, 345.

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against that influence which existed in a most exaggerated form and extent? Can it be asserted that these gifts were not made under the direct pressure of that influence in favour of the man who ought to have guarded this lavish testator against his acts of excessive bounty? In addition to the existence of influence at the time, there was concealment of the transaction with the utmost care during the testator's lifetime, and that want of full and frank disclosure which would invalidate even a transaction of purchase and sale, which stands on a different footing from that of mere bounty.

Argument.

BACON, V.C.:—

Judgment.

This case must be decided, not upon the facts alone, although they are not to be disregarded, but upon a simple question of law. The law I take to be as plainly settled on the subject as any law existing in this country, that while the relation of solicitor and client subsists the solicitor cannot take a gift from his client. That is the rule of law, a rule which, if it was necessary for me to justify it, I should say was requisite for the safety of society. However, it is not for me to justify it, because I find the rule clearly and plainly established for a very long time and without qualification. There may be circumstances which would shew that that relation has been put an end to, so that the parties are at liberty to deal notwithstanding the former existence of that relation. In all the cases that have been referred to there has been no doubt whatever thrown upon the rule to which I advert, although in each of the cases there has been a careful investigation and scrutiny into the facts to ascertain whether the case then to be decided came within the rule, or whether there were circumstances which prevented the application of it. In none of the cases which have been decided has the rule been denied; certainly *Harris* v. *Tremenheere* (1) is not one, because there there were three different subjects of consideration, the relation of solicitor and client having existed in that case. As to the first point, the Court was satisfied that it was not a gift to the solicitor, but a gift to the lady, who was either married or was about to be married; as to the second, that it came within the character of a purchase, that the granting of the leases carried with it an obligation on the part

(1) 15 Ves. 34.

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of the person to whom they were granted, so that it could not be called a gift; and as to the third, there was no doubt about it. But the case which was most particularly noticed in the course of the discussion is *Tomson* v. *Judge* (1), not only because of the authority of the Court, but for the value of the elaborate scrutiny and investigation and comment on all the cases which up to that time had been decided, and the distinction which justice requires, which was there drawn between cases of purchase by a solicitor from his client and cases of gift by a client to his solicitor. The law, in accordance with every case that has been decided, is found to be the same. It cannot be said that that often-noticed case of *Hunter* v. *Atkins* (2) forms any exception to it, because the decision there proceeds on the fact that there was no such relation between the parties; and that being so, of course there is no law in this or any other country, that I know of, which would prevent a man from doing what he pleases with his own property or money, whether by way of gift or otherwise. But a great deal of observation is contained in that judgment of *Hunter* v. *Atkins*, which has been often commented upon and often criticised, with which I need not trouble myself at present, because the decision, which is the only thing that I am bound by, does not relate to such a state of circumstances as exists before me in this case. That the relation of solicitor and client existed between Mr. *Minett* and the testator is not called in question in the slightest degree. It is not said that that relation prevents a client bestowing his bounty upon his solicitor, but what the law requires is that, considering the enormous influence which a solicitor in many cases must have over his client, in order to give validity and effect to a donation from a client to his solicitor that relation must be severed. The parties must be, as one of the cases says, "at arm's length." The relation must have ceased to exist. If that can once be established, there is an end to the influence; whatever the influence may have been before need not be inquired into; the influence does not exist when that state of circumstances is brought about, and then the client may as well give to a solicitor as give to any other person. The degree of influence need not be inquired into. The fact of the influence is enough if it be established. These Courts

(1) 3 Drew. 306. (2) 3 My. & K. 113.

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have not those golden scales which are said to be used in the mythological heaven to regulate the destinies of mankind. You cannot inquire how much influence there was; it is enough, in the contemplation of the law, that the influence existed, that there is a possibility that it may be abused; and the rule is not a hard one upon a solicitor. A client inclined to bestow bounty upon his solicitor is at perfect liberty to do it, and the solicitor is at perfect liberty to accept it, but both of them must act under circumstances which preclude the possibility of suspicion, for suspicion is enough. Suspicion is the basis of that rule of influence, and nothing could have been easier in the case before me than for Mr. *Minett*, who is proved by himself to have had influence—I was going to say unbounded influence—over the testator, to have said, "We have been in this relation together for all these years, you desire to confer bounty upon me, the law does not enable me to accept it while we stand in that relation to each other, the law does not preclude you from giving it to me, but it prevents me from accepting it while that relation exists, therefore let us put an end to that relation, let us stand as strangers to one another. I cease to be your solicitor, nobody can then say that I have any influence arising from that character, and then give me whatever you like." That is not what was done in this case; not only does the relation exist up to the day of the testator's death, but Mr. *Minett* has very carefully proved, so far as he can, and so far as the witnesses can, the extent of that influence, and if it be less than unbounded, I do not know in what words to express it. It is very difficult, in my mind, to contemplate a case in which influence could be greater than that which Mr. *Minett*, honestly enough, no doubt, exercised over the testator, and it is under these circumstances that the three releases the subject of this suit were given by the testator to Mr. *Minett*. The only ground of defence which has been stated is that disclosed by Mr. *Gwynne James'* evidence. When that is examined what does it come to? Mr. *Minett* having obtained these releases, two of them at least, without the intervention of any other person, without explanation to any other person, without disclosure of the fact to any other person, bethinks himself that it would be right to have Mr. *Gwynne James* to give explanations to the testator or to prepare the codicil to his will, and accordingly Mr. *Gwynne James*, who is a person of the highest respectability and whose evidence

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may be received without the slightest qualification, is first summoned by Mr. *Minett* to his office, where he lays before him an epitome of the several wills which the testator had up to that time executed, and a statement, moreover, that he had executed two releases which were then in existence, forgiving considerable debts due from Mr. *Minett*. A request had been made to Mr. *James* to wait upon the testator. For what purpose was he to wait on him? To ascertain whether the testator knew perfectly well that he had released Mr. *Minett* and had made the will. That will is out of the question at present, but that he had executed the releases, the testator knew perfectly well himself. He was not an imbecile man, he was not short-witted, he knew perfectly well what he had done. Mr. *James*, furnished with that information, goes to the testator, carefully goes through with him the lists of the bequests that he had made by his wills and codicils, ascertains that they were exactly what he meant, and learns from him also that he had released Mr. *Minett*, his solicitor, upon the two occasions referred to. Is that what the law requires? The law requires that the relation should be severed in the first place. It requires that in consequence of that severance some independent advice should be obtained by the donor. Mr. *James* in his examination does not say (and of course if he had done it he would have said so) that he ever explained to the testator what the law was upon the subject, or why the interference and advice of an independent person was necessary. He does not give him any of that advice, or any of that information or explanation of the law which it was indispensably necessary to do in order to give validity to the two releases which had been executed by the testator gratuitously and in favour of his solicitor. That is the whole case. Upon the case admitted we have the fact that Mr. *Morgan*, the testator, being under the unquestionable influence of a solicitor, having strong regard for him, being unable to move without him, did (whether of his own free will or in consequence of solicitation nobody alive can tell) execute these two releases in rapid succession. Why one was executed on one day and the other on the next day there has not been a particle of explanation. They were prepared by Mr. *Minett* in his own handwriting, sent to the testator in an exceedingly off-hand way, with directions that he should execute them and get them attested, and the schoolmaster comes and

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attests the execution, and they are sent back to Mr. *Minett*, and that is all. Not one word of explanation, no reason suggested, no reason even by Mr. *Minett* why these releases should be executed. If, under these circumstances, a gift obtained by a solicitor from his client with no more information than is furnished me upon this occasion can stand, then I say that I cannot reconcile that with the plain law on the subject, a law which has been in existence for a long time, and in my opinion is absolutely necessary, which inflicts no hardship upon the donor or donee, and which makes that clear which ought to be clear considering the relation of the parties. I am therefore of opinion that the Plaintiffs have established a case for having these releases set aside.

I have not observed upon the third release, because it is not necessary to do so. That was unquestionably executed at the time when the relation subsisted, and as to that it is not pretended that advice or any thing of that sort was furnished to the testator. There must therefore be a decree to set aside those three releases, which is all that I have to decide in this case.

Solicitors: *Collyer-Bristow, Withers, & Russell; Thomas Fortune.*

WRIGHT *v.* LAMBERT.

V.-C. B. 1877 June 15.

[1873 W. 123.]

Administration—Reversionary Interests—Tenant for Life—Mode of calculating Tenant for Life's Interest.

Testatrix, being possessed of reversionary interests, bequeathed them to a tenant for life, with remainder over. Before the reversionary interests fell into possession, the devisee for life died.

The reversionary interests having afterwards fallen in:—

Held, that, in estimating what was due to the estate of the devisee for life, the value of the reversions must be calculated as at the end of a year from the testatrix's death, on the assumption that they would fall in when they actually did; and that the devisee for life was entitled to £4 per cent. on that amount from the death.

Wilkinson v. *Duncan* (1) followed.

FURTHER CONSIDERATION.

Statement.

William Sowerby died in 1855, having by his will, dated the 30th of November, 1852, devised and bequeathed a dwelling-

(1) 23 Beav. 469.

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house and premises and a sum of £6000 upon trust for his wife *Elizabeth* for life, and after her death for the benefit of *Amelia Hill*, spinster, in like manner, as was thereinafter expressed respecting his residue. He bequeathed £4000 upon trust for his niece *Sarah*, wife of *John Wingrove*, for life, for her separate use without power of anticipation, and afterwards for her children, and in default, to fall into his residue. He bequeathed a house, No. 1, *Devonshire Terrace*, to his wife for life, and afterwards upon trust for *Amelia Hill* as before. He also bequeathed a house, No. 2, *Devonshire Terrace*, to Mrs. *Wingrove* for life, and afterwards to her children, and in default of children for the benefit of *Amelia Hill* as before. The residue of his real and personal estate testator devised and bequeathed upon trust, during the joint lives of his wife and *Amelia Hill*, to pay the rents of the former and the proceeds of the latter unto and equally between them, and after the death of either, to pay the whole to the survivor for life, and after the death of the survivor, he directed the whole to be for such person or persons as *Amelia Hill* should by deed or will appoint.

By a deed poll, dated the 7th of May, 1855, *Amelia Hill* appointed all the property over which she had disposing power under *W. Sowerby's* will to herself absolutely.

In 1859 *Amelia Hill* married *Charles Ferguson*, who died in 1865. There was never any issue of the marriage.

Amelia Ferguson, widow, died on 30th of May, 1866, having by her will, dated the 6th of January, 1866, after directing the payment of debts, funeral and testamentary expenses, legacies, and an annuity, bequeathed to two trustees and executors, of whom *Thomas Wright* became the survivor, the residue of her real and personal estate, upon trust to invest, and pay the produce of the investments to her mother, *Hannah Hill*, during the joint lives of the said *Hannah Hill* and *Elizabeth Sowerby*, widow, and after the death of either, she gave several charitable legacies directing as follows:—"The said charitable legacies to be paid out of such part of my personal estate as may by law be bequeathed for charitable purposes;" and other pecuniary legacies. Amongst the legatees was the executor *Thomas Wright*.

She then gave to the trustees of her will a legacy of £2500 upon trust to invest the same, and pay the annual produce to her cousin *Edward Hill* for life, and afterwards upon trust for his

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children as therein mentioned. She gave another legacy of £2500 upon trust in like manner for her cousin *Ellen Hill* for life, for her separate use without power of anticipation, and afterwards upon trust for her children. She gave a further lagacy of £3000, upon trust, for her mother's brother *Edward Hill* for life, and afterwards for the benefit of his children, a further legacy of £3000, upon trust, for her mother's sister *Mary*, wife of *James Galbraith*, for life, for her separate use without power of anticipation, and afterwards for her children; a further legacy of £3000 upon trust for her mother's sister *Jane*, wife of *John Lambert*, for life, for her separate use without power of anticipation, and afterwards for *Jane Lambert's* daughter *Jane*, the wife of *Thomas Stott*, for life, for her separate use without power of anticipation, and after the deaths of *Jane Lambert* and *Jane Stott*, for the benefit of the children of the latter. She then gave a further legacy of £3000 upon trust for her mother's sister, *Margaret Hill*, for life, and after the death of *Margaret Hill*, and on failure of any of the above-mentioned classes of children, the respective legacies were to fall into the residue.

Testatrix then directed her trustees to invest the residue and pay the annual produce to her mother, *Hannah Hill*, for life, and after her death to stand possessed of the same upon trust for *Simon Dickson Graham* absolutely.

The testatrix's estate was insufficient to pay all these legacies in full.

Hannah Hill, the testatrix's mother, died on the 19th of August, 1868, having by will appointed the before-mentioned *Thomas Wright* her sole executor.

Simon Dickson Graham, the residuary legatee under the testatrix's will, died on the 27th of February, 1871.

Elizabeth Sowerby, the tenant for life under *William Sowerby's* will, died on the 1st of September, 1871.

The bill was filed on the 16th of May, 1873, by *Thomas Wright* against *Jane Lambert*, widow, *Thomas Stott* and *Jane* his wife, and their five infant children, for the administration of the testatrix Mrs. *Ferguson's* estate.

It stated the above facts, and as follows:—

"12. The said *Elizabeth Sowerby* was in the eighty-sixth year

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of her age at the time of the death of the testatrix *Amelia Ferguson*, and as her life interest might in the course of nature be expected to terminate soon, it was considered, and was in fact, for the benefit of the testatrix's estate to await the falling into possession of the testatrix's reversionary interests under the said *William Sowerby's* will, rather than incur the disadvantage of selling them whilst reversionary; and accordingly the realization of this portion of the testatrix's property was deferred until the death of the said *Elizabeth Sowerby*."

"29. By reason of the reversionary character of the bulk of the testatrix's assets during the said *Hannah Hill's* life, no payment was ever made to the said *Hannah Hill* out of the testatrix's assets in respect of her estate and interest in the income thereof under the testatrix's will; nor has any payment or appropriation been made to her executor since her death in respect of such her estate and interest; and the Plaintiff, as such executor as aforesaid of the said *Hannah Hill*, is advised and claims that the said *Hannah Hill's* estate is entitled not only to receive from the testatrix's estate the income which, from the testatrix's death down to the said *Hannah Hill's* death, accrued from the testatrix's property, but also to be placed in the same position with regard to the income from the testator's reversionary property as if such reversionary property had been actually realized so as to produce income at the expiration of one year after the testatrix's death; and, accordingly, that the value at the expiration of such year of testatrix's reversionary interest in the different portions of the said *William Sowerby's* estate ought to be ascertained; and that the difference between such value and the amount which in each case was in fact subsequently realized ought to be considered as income arising from the testatrix's estate; and that the estate of the said *Hannah Hill* is now entitled to receive out of the testator's assets such a sum as shall represent the proper proportion of such income according to the period during which the said *Hannah Hill* survived the testatrix."

The decree was dated the 27th of June, 1873, and the Chief Clerk's certificate was made on the 6th of March, 1877.

He found, amongst other things, that of the reversionary interests to which the testatrix was entitled at her death, part fell

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into possession on the 1st of September, 1871, and part was still outstanding, expectant on the death without issue of Mrs. *Wingrove*. He also found as follows:—

Statement.

"The net value, after deducting succession duty, on the said 1st day of September, 1871, of the said reversionary interests which so fell into possession on that day as aforesaid was the sum of £18,380 18*s.* 9*d.*; and the net value thereof on the 30th day of May, 1867, being the expiration of one year after the testatrix's death, was £11,482."

From the evidence it appeared that the former of these two valuations was based upon the sums which were actually received in respect of the reversionary interests when they fell in; the latter was an actuary's estimate of what on the 30th of May, 1867, was the then present value of the same sums, having reference to Mrs. *Sowerby's* age, according to the ordinary tables of life average.

The cause now came on upon further consideration.

Argument.

Kay, Q.C., and *Mounsey-Heysham*, for the Plaintiff, *Thomas Wright*:—

The testatrix having herself marshalled the assets in favour of the charities, the charitable legacies do not abate: *Robinson* v. *Geldard* (1).

In our character of legatee under the testatrix's will, we contend that what the estate of Mrs. *Hill*, the devisee for life, is entitled to is interest at £4 per cent., from the testatrix's death to her own death, upon the value of the reversionary interests as they stood at the expiration of one year from the testatrix's death; such value being estimated according to the ordinary average life tables. That is to say, her estate is entitled to interest at 4 per cent. for two years and a fraction, on £11,482, the sum found by the Chief Clerk.

In *Wilkinson* v. *Duncan* (2), Lord *Romilly*, M.R., laid down a different rule. As the devisee for life in that case, as here, received nothing till the reversionary interests fell in, the Master of the Rolls held that the devisee for life was entitled to income

(1) 3 Mac. & G. 737, 742. (2) 23 Beav. 469.

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upon the value at the end of one year from the death, calculated not upon the expectancy according to tables of life average, but upon the assumption that it would fall in when it actually did.

This rule, we submit, is not the law of the Court, since *Brown* v. *Gellatly* (1). Why should the devisee for life get more or less than the estimated value at the time when she became entitled? The result cannot alter the value of the expectation.

Warmington, for the executors of *S. D. Graham*, and some pecuniary legatees, supported the same view.

Sir *H. Jackson*, Q.C., and *Jason Smith*, for *Edward Hill*, the tenant for life of one of the legacies under the testatrix's will, but who claimed a larger interest under the will of *Hannah Hill*:—

Our interest is, that Mrs. *Hill's* estate should be increased as much as possible; and our contention is that her estate is entitled to 4 per cent. from the testatrix's death to her own death upon the present value, on the 30th of May, 1867 (one year after the death), of the sum of £18,380 18*s.* 9*d.* found by the Chief Clerk to have been the amount actually received in respect of the reversionary interests; that is to say, a sum of about £15,660.

We rely upon the rule in *Wilkinson* v. *Duncan* (2), which was not intended to be, and was not, altered by *Brown* v. *Gellatly*, a decision which had nothing to do with the point. *Wikinson* v. *Duncan* was not cited in *Brown* v. *Gellatly*.

The principle was recognised by Vice-Chancellor *James* in *Potts* v. *Smith* (3), that in estimating the value at the testator's death of an annuity, regard must be had to the events which had hap-happened up to the time of the valuation, and the learned Judge said that if it were necessary he must hold that the new rule had superseded the old.

Kay, in reply, said he would not contest the point further.

Judgment.

BACON, V.C., held that the value of the reversion which fell in in 1871 was to be calculated at the end of a year from the date

(1) Law Rep. 2 Ch. 751. (2) 23 Beav. 469.
(3) Law Rep. 8 Eq. 683.

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of the testatrix's death, on the assumption that it would fall in when it actually did; and that the tenant for life was to have £4 per cent. on that amount from the death.

The Court also held that the charitable legacies did not abate; also that the sum due to Mrs. *Hill's* estate did not abate, inasmuch as it consisted of interest on a principal sum which had abated already, by reason of the insufficiency of the testatrix's estate.

Minutes accordingly.

Solicitors: *Gray, Mounsey, & Co.; James, Curtis, & James; Farmer & Robins.*

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In re MITCHELL'S ESTATE. MITCHELL *v.* MOBERLY.

[1876 M. 170.]

Mortmain Act—Railway Company—Debenture Mortgage—Assignment of Undertaking and Tolls—Charity—Interest in Land.

A debenture mortgage made by a railway company in the form given in Schedule C of the *Companies Clauses Consolidation Act*, 1845, does not give the debenture holder an interest in land within the *Statute of Mortmain*.

Statement.

ADJOURNED SUMMONS.

In this suit, instituted for the administration of the estate of the late *Thomas Alexander Mitchell*, M.P., the following question arose:—

Mr. *Mitchell* was at his death possessed of a debenture mortgage for £2000 issued by the *Bridport Railway Company*, in the following terms, being the form prescribed by Schedule C of the *Companies Clauses Act*, 1845 (8 Vict. c. 16):—

STAMP. £2. 10.

"The *Bridport Railway Company*.

"Mortgage, No. 52. £2000.

"By virtue of the *Bridport Railway Act*, 1855, we, the *Bridport Railway Company*, in consideration of the sum of two thousand

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pounds paid to us by *Thomas Alexander Mitchell*, of 50, *Charles Street, Berkeley Square*, in the county of *Middlesex*, Esquire, do assign unto the said *Thomas Alexander Mitchell*, his executors, administrators, and assigns, the said undertaking, and all future calls on shareholders, and all the tolls and sums of money arising by virtue of the said Act, and all the estate, right, title, and interest of the company in the same; to hold unto the said *Thomas Alexander Mitchell*, his executors, administrators, and assigns, until the said sum of two thousand pounds, together with interest for the same at the rate of five pounds for every one hundred pounds by the year, be satisfied, the principal sum to be repaid at the end of three years from the date hereof at the principal office of the company in *Bridport*, in the county of *Dorset*.

SEAL. "Given under our common seal this thirtieth day of July, in the year of our Lord one thousand eight hundred and sixty-eight.

"*E. G. Flight*, Secretary."

The instrument was indorsed as follows:—

"The *Bridport Railway Company*.

"We the undersigned, being two of the directors of the company specially authorized and appointed for this purpose, and I the undersigned registered officer of the company, do hereby declare, each for himself, that the within written mortgage deed is issued under the borrowing powers of the company as registered on the sixth day of July, 1868, and is in substitution for a mortgage deed which has since been paid off. Dated this 30th day of July, 1868.

"*Thos. Legg*,
"*Jno. P. Stephens*, } Directors.

"*E. G. Flight*, } Secretary and Registered Officer."

The residue of the testator's estate having been bequeathed to a charity, the next of kin contended in Chambers that the debenture was an interest in land within the Mortmain Acts; and hence that it was not well disposed of by the will to the charity.

This question was now adjourned into Court.

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Kay, Q.C., and *Tremlett*, for the executor:—

This debenture is pure personalty: *Holdsworth* v. *Davenport* (1); *Gardner* v. *London, Chatham, and Dover Railway Company* (2).

Before the last-mentioned decision debentures were held to be within the *Mortmain Act*. But the nature of a debenture had not until then been carefully considered. It is now settled that such an interest as this is not a mortgage of land.

A share in a company is a right to receive earnings. A shareholder has as much right as a debenture holder to say he is a part-owner of the company's land. But it has long been held that a share in a company is not an interest within the Act.

Chandler v. *Howell* (3) is distinguishable on the ground that that was an actual mortgage of "works, rents, and rates."

In *Gardner* v. *London, Chatham, and Dover Railway Company* the appointment of a receiver and manager at the suit of a debenture holder was refused. In *In re Langham's Trust* (4) Lord *Hatherley*, then Vice-Chancellor *Wood*, drew a distinction between a share in a canal company and an assignment by way of mortgage of the "tolls, rates, and duties" vested in the company, "and also the navigation, undertaking, and premises," and all the estate, right, title, and interest of the company. This distinction is no longer maintainable after the remarks of Lord *Cairns*, L.C., in *Gardner* v. *London, Chatham, and Dover Railway Company* (5).

Lord *St. Leonards*, so long ago as in *Myers* v. *Perigal* in 1852 (6), pointed out the change in the current of authorities, which had even then begun to take place.

[He referred also to *Seton* on Decrees (7).]

A. T. Watson, for the City of *London*, the charitable legatee, supported the same view.

Sir *H. Jackson*, Q.C., and *Reginald Hughes*, for the Plaintiff, the widow, took no part in the discussion.

(1) 3 Ch. D. 185.
(2) Law Rep. 2 Ch. 201.
(3) 4 Ch. D. 651.
(4) 10 Hare, 446.
(5) Law Rep. 2 Ch. 217.
(6) 2 D. M. & G. 599, 619.
(7) 3rd Ed. p. 1034.

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Argument.

Hemming, Q.C., and *William Barber*, for the next of kin:—

In *Holdsworth* v. *Davenport* (1) Vice-Chancellor *Malins* was influenced wholly by the decision in *Gardner* v. *London, Chatham, and Dover Railway Company* (2). But, in truth, this decision did not touch the point in *Holdsworth* v. *Davenport*; for the only question was whether the word "undertaking" included superfluous lands.

As to shares in companies, the question has long ago been settled, and that may be dismissed; so may also the question as to debenture bonds. But as to debenture mortgages the matter is still open.

In *In re Langham's Trust* (3) the mortgage consisted of an assignment of the "tolls, rates, and duties" of a canal company; also of "the navigation and undertaking," and of "all the estate, right, title, and interest" of the company; and the Vice-Chancellor (*Wood*) had to adjudicate not only upon mortgages, but upon shares. The Vice-Chancellor held that the case of an express assignment of tolls was different from that of a share; the share gave the holder only a right to a share in the profits; but the mortgagee was placed by the assignment in the same position as the company themselves. In certain events the mortgagee might have a receiver, and a person who personally, or through a receiver, might take the tolls, was held to have acquired an interest in land. This authority was not overruled by *Gardner* v. *London, Chatham, and Dover Railway Company*. The mortgage in *In re Langham's Trust* was under a statute passed before 1845, but similar in effect.

The other recent authority in our favour is *Chandler* v. *Howell* (4). There the security was a mortgage of the "works, rents, and rates authorized to be erected, reserved, made, and collected" by the Act. In the present instance the words are, "the undertaking" and "the tolls"; so that there is no substantial difference; "works" and "undertaking" being identical, as appears even from the observations in *Gardner* v. *London, Chatham, and Dover Railway Company*.

The decisions upon which Vice-Chancellor *Hall* founded his

(1) 3 Ch. D. 185, 190.
(2) Law Rep. 2 Ch. 201.
(3) 10 Hare, 446.
(4) 4 Ch. D. 651.

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judgment in the last-mentioned case are *Howse* v. *Chapman* (1); *Finch* v. *Squire* (2); *Ashton* v. *Lord Langdale* (3); *In re Langham's Trust* (4); *Thornton* v. *Kempson* (5); *Ion* v. *Ashton* (6).

In *Bunting* v. *Marriott* (7) the question arose upon a *Tothill Fields* Improvement Bond, the terms of which are not set out in the report, but which, from 6 Geo. 4, c. cxxxiv. s. 98, appear to have been in the form of a grant and assignment or conveyance "unto the said [or his trustee or trustees, as the case may be] his or her executors, administrators, and assigns [or heirs and assigns, as the case may require], such proportion of the rates to be raised, levied, and collected by virtue of the said Act as the said sum of doth or shall bear to the whole sum which may at any time be borrowed, or become due and owing, or be charged upon the credit of the same rates [or all that messuage, *et cetera*, describing the messuages, lands, hereditaments, or other property to be conveyed], to be had and holden from this day of until the said sum of , with interest after the rate of per centum per annum for the same, shall be fully paid and satisfied." The decision, therefore, does not necessarily conflict with that in *Ion* v. *Ashton*.

The only authorities against us are *Walker* v. *Milne* (8) and *Holdsworth* v. *Davenport* (9). But Vice-Chancellor *Knight Bruce*, in *Ashton* v. *Lord Langdale*, declined to follow *Walker* v. *Milne*, on the ground that a mortgage of tolls was a mortgage of a hereditament—as a matter of law, wholly independent of any question of expediency, such as the impropriety of breaking up the undertaking; and if Vice-Chancellor *Malins*, in *Holdsworth* v. *Davenport*, supposed that Vice-Chancellor *Knight Bruce's* view was overruled by the Court of Appeal in *Gardner* v. *London, Chatham, and Dover Railway Company* (10), we submit that His Lordship took an erroneous view of the last-named case. It may be an illogical result that shares should be not within the *Mortmain Act*, and that mortgage debentures should be within the Act; but this is the law laid down in *In re Langham's Trust* and other

(1) 4 Ves. 542.
(2) 10 Ves. 41.
(3) 4 De G. & Sm. 402.
(4) 10 Hare, 446.
(5) Kay, 592.
(6) 28 Beav. 379.
(7) 19 Beav. 163.
(8) 11 Beav. 507.
(9) 3 Ch. D. 185.
(10) Law Rep. 2 Ch. 201.

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cases, which the Court of Appeal would not by a side wind, and as a matter of fact did not, repeal. In the *Gardner* suit it is a mistake to suppose that no receiver was appointed. There the order of the Vice-Chancellor *Stuart*, appointing a manager, was made without opposition and in effect by consent. If the application had been opposed, the Vice-Chancellor would not have made the order; and upon the appeal it was held, as was then well settled, that the Court had no jurisdiction to appoint a manager. The order, as finally made (p. 223), continued the receivers of the undertaking and tolls, but the order was made not to extend to superfluous lands. So that the old distinction, viz., that a mortgagee has a right to a receiver, whereas a shareholder has not, was not interfered with by *Gardner* v. *London, Chatham, and Dover Railway Company* (1), and there was no intention on the part of the Court of Appeal to alter the law which, rightly or wrongly, has, since Lord *Eldon's* time, been founded on that distinction. That this is the view of Vice-Chancellor *Hall* appears from *Chandler* v. *Howell* (2).

Ashton v. *Lord Langdale* (3) and *In re Langham's Trust* (4) are undistinguishable from this case; they rule the point; whereas *Gardner* v. *London, Chatham, and Dover Railway Company* was not in *pari materiâ*, and these cases were not cited in the argument and cannot be supposed to be overruled. Every word of the judgment in *In re Langham's Trust* might have been said as well after *Gardner* v. *London, Chatham, and Dover Railway Company* as before; and it is just as good law now as if the subsequent case had never been decided. There is no conflict whatever between them, for they deal with two wholly independent subjects.

Kay, in reply.

Judgment.

BACON, V.C.:—

No doubt there is very great difficulty in this case. The principal difficulty arises from the two most recent decisions on the subject.

(1) Law Rep. 2 Ch. 201.
(2) 4 Ch. D. 651.
(3) 4 De G. & Sm. 402.
(4) 10 Hare, 446.

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The earlier decisions which have been gone through at great length on both sides, that of Lord *Eldon*, for example, which was first referred to, have established that tolls do constitute such an interest in land as comes within the *Statute of Mortmain*. Lord *Eldon's* expressions are very remarkable; and I have already noticed them in the course of the argument. I find him saying, in *Knapp* v. *Williams* (1), "It is not at all within the mischief" (which means the mischief which the law of mortmain was intended to prevent), "but the consequences would open a much larger field for charitable donations." Those struck me as being strange circumstances upon which to found a judgment; but nevertheless it is a judgment plain and distinct, and which I should not feel myself at liberty to call in question in the slightest degree, if the case before me fell within the facts, or the law, as Lord *Eldon* there decided it.

It is unnecessary to go through the other cases which have been mentioned, in which there arises a plain difference of opinion between the Judges. I allude, particularly, to the decision of Lord *Langdale* in the case of *Walker* v. *Milne* (2), and to the decision of Vice-Chancellor *Knight Bruce* in the case of *Ashton* v. *Lord Langdale* (3). The first decision is clear and plain, and is in favour of the debentures not being within the *Statute of Mortmain*. The judgment of the Vice-Chancellor *Knight Bruce* is not only in spirit, but is directly, in plain terms, opposed to it. The judgment is expressed in very few words. The learned Judge recognises the principle which had then been established, that shares in a railway company are not within the *Statute of Mortmain*, and then he says, "But with regard to mortgages of the undertakings and of the tolls, these interests proceed directly from the corporation, and appear to me to constitute 'a charge or incumbrance affecting lands, tenements, or other hereditaments, or some estate or interest therein,'" which are the words of the *Statute of Mortmain*. Then he says, "In my opinion they do directly and immediately charge hereditaments, namely, the tolls, if not the land itself, by the use of which the tolls are obtained; and if so, they are within the words of the 3rd section of the Act which have occasioned the great bulk of the

(1) 4 Ves. 430, n. (2) 11 Beav. 507.
(3) 4 De G. & Sm. 402, 413.

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decisions that are sometimes complained of. Upon this point I dissent, though most respectfully, yet so strongly, from the decision of the Master of the Rolls, that I ought I think to depart from it." That case was argued before the Vice-Chancellor *Knight Bruce* by Sir *William Page Wood*, as well as I gather from the report, and at a later period Vice-Chancellor *Wood* decided *In re Langham's Trust* (1), in which he seems to have followed that case; but not without considerable hesitation. In his judgment, he said (2), after alluding to the decision as to shares not being within the statute, "It was, however, different in the case of an express assignment of the tolls which the company were entitled to levy. The tolls did not belong to any individual shareholder, but they belonged to the company; and the company, by their assignment, placed their mortgagee in the same position, and gave him the same right as they had themselves. In certain events the mortgagee would be entitled to have a receiver of the tolls appointed; and a party who personally, or through the hands of a receiver, might take the tolls, had acquired a direct interest in land within the meaning of the statute. Without going to the extent of some former cases upon this point, he knew of no authority for saying, that a security which gave a direct right or charge upon property, which was in fact land, could be made the subject of a charitable bequest." That brings it round then to this point—that the shareholders' interest in the undertaking is not within the *Statute of Mortmain*.

Then it is said that the interest in an incorporated company is within the *Statute of Mortmain*, because that is necessary to be stated in order to justify these decisions. The decision by Vice-Chancellor *Knight Bruce* was pronounced at a time after railway companies had become somewhat familiar; but in Lord *Eldon's* time there was no such thing as a railway company known.

Then it remains to be considered what the nature of this railway undertaking is before you can ascertain whether (the interest which the shareholders have in it having already been decided not to be an interest in land) the interest which the undertakers, or the directors, or the incorporated company have, is such a one as can, according to the terms of the mortgage of it here expressed,

(1) 10 Hare, 446. (2) 10 Hare, 449.

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be said to bring the case within the enactment of the *Statute of Mortmain*. Now the principle of the law of mortmain is old enough, and much older than the *Statute of Mortmain*—or any statute of this country. It is a matter of public policy—a matter of political economy. It is "against the interest of the republic" that land should be held in a dead hand, unalienable. That is a most wholesome law, which I believe exists in almost all civilised countries. But there have grown up in this country of ours things totally different either from monastic establishments or any other encroachments made by incorporated companies, or by the authority of the Legislature. An incorporated company is entitled to hold in what may be said to be the dead hand the land which is necessary for them to complete their undertaking—they are the owners, no doubt, of the land. But they are owners in what sense? and for what purpose? They are owners of land in order that they may, by its possession, carry on a commercial undertaking. The difference between buying land and making a dock, and getting from the Legislature authority to levy tolls upon the persons who make use of their property—the difference between that and a trading company that carries on the business of common carriers and is engaged in various other undertakings, is perfectly obvious, and cannot be questioned. I am speaking now of the principle of it. Vice-Chancellor *Malins*, in considering all the cases that had gone before, and expressing a strong opinion upon them, although convinced of the necessity of adhering to those cases and obeying the decisions as far as he was called upon to pronounce upon the case, nevertheless, seems to have been struck with the inconvenience—I was going to say the absurdity—of applying the law of mortmain to a trading company; as indeed nobody can suggest a reason why the law of mortmain should be applied to a trading company. But then, finding the decision in *Gardner* v. *London, Chatham, and Dover Railway Company* (1), he felt himself relieved altogether from the weight of the former decisions, and that it was unnecessary for him to endeavour to reconcile the decisions as far as they were conflicting; and, therefore, upon the authority of *Gardner* v. *London, Chatham, and Dover Railway Company*, he decided that the interest which the mortgagee took under a debenture was not

(1) Law Rep. 2 Ch. 201.

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such an interest in land as brought it within the *Statute of Mortmain*. That is a very plain and distinct decision of his.

Then it is said that this is at variance with the decision more recently pronounced by Vice-Chancellor *Hall*. But the decision of Vice-Chancellor *Hall* is upon a totally different subject. The debenture there bears no kind of resemblance to the debenture in this case. That was a security made by a public company—not a trading company—but a municipal corporation for the improvement of a town. An Act of Parliament had been passed "for improving and regulating the town of *Aberystwith*" and "supplying the inhabitants thereof with water," and it vested in the commissioners thereunder the squares, roads, and streets within the town, and the soil thereof, and all buildings and works; and authorized the commissioners to purchase land, and so on. Having thus acquired land, in exercise of their powers they erected works; and they possessed a power to charge rents, rates, or whatever else was necessary in order to accomplish the purposes of their Act, not for their own benefit, not in the slightest degree for their own profit, for it could not be said that it was a trading concern in any sense. None of the attributes of a trading concern could apply in that case. Then, for the purpose of performing their duties under the Act of Parliament, the Commissioners borrow money, and they secure the repayment of that money by stating in the instrument that they have borrowed money "upon the credit of the works, rents, and rates authorized to be erected, reserved," and so on, and they "grant and assign . . . such proportion of the said works, rents, and rates" as may be necessary for the purpose. What kind of resemblance is there between that and a company incorporated for the purposes of trade—authorized for the purposes of trade to acquire land which, but for the Act of Parliament, they could not acquire, and acting under a variety of directions which are contained in the statute relating to them to carry on the business of common carriers, and the other business connected with railway companies? The Vice-Chancellor *Hall* keeps this steadily in view in his judgment; and in commenting upon those cases which had preceded it, and some of which were in conflict, he says this (1): "There is, however, a distinction between the case of shares and bonds which

(1) 4 Ch. D. 659.

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was recognised by Lord *St. Leonards* in *Myers* v. *Perigal* (1). There may also well be distinctions between shares in one company and in another, though the number of the persons constituting each company would not affect the question. A partner in an ordinary company has no interest in land vested in the company within the *Statute of Mortmain*, and this may be said as to shares, whatever be the constitution of the company." Then his Lordship refers, as I will immediately, to the judgment in *Gardner* v. *London, Chatham, and Dover Railway Company* (2), but he says this (3): "The form of the security given was such that, upon the true construction of the debenture, it did not give the holder the right which he was seeking in that case to have enforced." What was the right he sought to have enforced? There had been assigned to him by the debenture the undertaking. A part of the undertaking consisted of land which had been bought for the purpose of the railway, and which in the further progress of the railway turned out to be surplus land, but which was nevertheless land acquired under the powers of the Act of Parliament, and which unquestionably, until the company parted with it, was a part of the undertaking. Vice-Chancellor *Hall* says (4): "That was expressly held in the judgment of Lord Justice *Turner*, who put it entirely on that ground. And as to that, the argument for the Defendant has a strong bearing, that is, that necessarily, from the character of the undertaking and the nature of the security, it is not a fair construction of the instrument to hold that the parties were ever intended to be in a position to take the undertaking itself, or anything but the fruit of the going concern; and that what the debenture holder in that case was proposing to do would have the effect of stopping the concern altogether. Those observations have an important bearing upon the question whether the principles of the decision in *Gardner* v. *London, Chatham, and Dover Railway Company*, when applied to a case like this, would shew that the holder of the security in this case would not have an interest in the land."

Then, when I turn to the case of *Gardner* v. *London, Chatham, and Dover Railway Company*, it seems to me clearly to

(1) 2 D. M. & G. 599.
(2) Law Rep. 2 Ch. 201.
(3) 4 Ch. D. 660.
(4) Ibid. 660, 661.

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cover this case. Railways having then become very numerous in this country, and their interests being frequently the subject of decision, what the Court was called upon to decide there was, whether the form (which was the same as the form here) did pass an interest in the land? If it did, the debenture holder's right was irresistible. There was surplus land, part of the undertaking; and if he had an interest in land, then it was quite clear he might have asserted his legal right. Now not only is the common law case of *Doe* v. *St. Helen's Railway Company* (1), referred to in *Ashton* v. *Lord Langdale* (2), before Vice-Chancellor *Knight Bruce*, on the face of it a clear, plain decision, but I hold it to be so notwithstanding the somewhat ambiguous expressions in which the Vice-Chancellor dealt with that case. It was a clear decision that there was no such legal interest in the land—legal at least in the common law sense—as would justify a shareholder in bringing ejectment; but if he had an interest, I do not know why he could not have brought ejectment. It is a plain decision that he has no such interest in the land as would sustain ejectment. Mr. *Hemming* said he might still have such an interest in land as would entitle him to apply for a receiver. That is what was decided in *Gardner* v. *London, Chatham, and Dover Railway Company* (3), namely, that he had no such interest. The judgment in *Gardner* v. *London, Chatham, and Dover Railway Company* is so clear, so elaborate, and was so well considered by both the Judges who had to deal with it, that it is in vain to say that *Lord Eldon's* case and the other cases were not cited in the course of the discussion. Whether they were or not, the principles of law must have been present to the Judges who dealt with it, and if the objection could have been maintained at all, that it was an interest in land, then the judgment in *Gardner* v. *London, Chatham, and Dover Railway Company* is all wrong and all beside the matter. Lord *Cairns* takes the case by itself, and deals with it as if it were an interest created in the trading company, distinguishing it, not in words but in meaning, from a canal company or a dock and harbour company, entitled only to tolls and rates, or to any other than that with which he had to deal, namely, a commercial undertaking, which

(1) 2 Q. B. 364. (2) 4 De G. & Sm. 402, 412.
(3) Law Rep. 2 Ch. 201.

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required the assistance of a manager. The company could not be carried on without a manager, and the result of that was to produce what he in his language calls "a fruit-bearing tree"; and then the company, having that in their possession, and that being their undertaking, charge that undertaking with the payment of the money they borrowed; and although the words "tolls and rates" are to be found, they must have meant the rates which this trading company could levy, not the tolls and rates mentioned in Lord *Eldon's* judgment, as to which I have nothing to say, but to speak of it with reverence whatever doubt I may feel—not tolls and rates upon a turnpike road, but tolls and rates which were earned by the expenditure of the company, and by the labour of their servants, in carrying on that general undertaking; and until those charges were defrayed there could be nothing coming either to the debenture holders or to the shareholders, or to anybody else. Profits, and profits alone, are what it is proposed to be assigned by the debenture. Now Lord *Cairns*, in the observations which have been frequently read, but which I may refer to shortly again, says (1): "Whatever may be the liability to which any of the property or effects connected with it may be subjected through the legal operation and consequences of a judgment recovered against it, the undertaking, so far as these contracts of mortgage are concerned, is, in my opinion, made over as a thing complete or to be completed; as a going concern, with internal and parliamentary powers of management not to be interfered with; as a fruit-bearing tree, the produce of which is the fund dedicated by the contract to secure and to pay the debt." If that is all, what becomes of the suggestion—whatever has been decided before, and whatever previous cases have decided—that this is an interest in land? The contrary is decided by the highest authority except the House of Lords, and decided in a manner which shews, as all will admit, and as those who do not recollect the judgment cannot fail to see on reading it, that it received the utmost attention and the most minute consideration from the Judges who had to deal with it. I take it that *Gardner* v. *London, Chatham, and Dover Railway Company* (2) establishes this—

(1) Law Rep. 2 Ch. 217. (2) Law Rep. 2 Ch. 201.

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that the undertaking, which was the subject there, was a thing which from its very nature never could be comprehended within the *Mortmain Act*. To hold the contrary would be to negative and disregard every word of this judgment, which applies to the undertaking itself, the nature of the undertaking and its consequences—the results of the trade as carried on under the Act of Parliament. His Lordship proceeds to say (1): "The living and going concern thus created by the Legislature must not, under a contract pledging it as security, be destroyed, broken up, or annihilated. The tolls and sums of money *ejusdem generis*—that is to say, the earnings of the undertaking—must be made available to satisfy the mortgage; but, in my opinion, the mortgagees cannot, under their mortgages, or as mortgagees—by seizing or calling on this Court to seize" (which is only the mode of exercising the legal or equitable right which they have) "the capital, or the lands, or the proceeds of sales of land, or the stock of the undertaking—either prevent its completion, or reduce it into its original elements when it has been completed." Then the Lord Justice *Turner's* judgment is, in my opinion, equally conclusive upon the same point. It says (2): "Lastly, the debenture assigns to *Gardner* 'all the estate, right, title, and interest of the company in the same.' But these words are merely referential, and cannot alter the construction of what has gone before. They cannot, I think, be construed to extend the operation of the debenture. My opinion is that, upon the true construction of this debenture, it proceeds upon the footing of the railway being treated as a continuing and going concern, and that it operates only to charge the railway and the works connected with it, and the tolls and sums of money of the like nature arising from it, in favour of the debenture mortgagee. Had it been intended to go further and to charge the capital of the railway company, and the surplus lands" (which are undistinguishable from any other lands), "as it was contended before us that it does, there can be no doubt that apt words could have been found for that purpose." Then he speaks of the assignment of the undertaking which was necessary to protect the debenture creditors against other claimants

(1) Law Rep. 2 Ch. 217. (2) Law Rep. 2 Ch. 221, 222.

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upon the property of the company. In other parts of the judgment he expresses a clear opinion that the only charge which the debenture holders have is a first charge on the profits.

Now that was the state of the law when the question came before Vice-Chancellor *Malins*. Nobody can doubt that Vice-Chancellor *Malins* bestowed as much consideration upon this difficult subject as the case required. He goes carefully through all the cases that have been decided. It is not necessary for me to repeat them, but, referring to Lord *Hatherley's* distinction in *In re Langham's Trust* (1), and the distinction which Vice-Chancellor *Knight Bruce* drew in the cases that have been referred to, Vice-Chancellor *Malins* says (2): "That seems to me a refinement of distinction between cases as to which I agree with the opinion of Lord *Langdale* in *Walker* v. *Milne* (3), that there is no material difference, and though I feel a profound respect, generally, for the judgment of Sir *James Lewis Knight Bruce*, I entirely dissent from it in this instance; because to say that shares in a company are not an interest in land, but that an assignment of them, which is what a debenture really amounts to, is such an interest, seems so unreasonable, that I should have decided the contrary without hesitation if it had not been for those two decisions." As I read that expression of opinion by the Vice-Chancellor, it would then have been his duty to have considered those two decisions which were in conflict with the others he mentioned; but he thought it was not necessary, because he says (4): "All questions are now removed by *Gardner* v. *London, Chatham, and Dover Railway Company* (5), which decided that a mortgage debenture made by a railway company in the form given in Schedule C of the *Companies Clauses Consolidation Act*, 1845, does not give the debenture holder a specific charge upon the surplus lands of the company, or the proceeds of the sale of them, so as to entitle him to an order for a receiver of the sale moneys or interim rents. Therefore the mortgagee has only a right to take the tolls, and it follows that he has not an interest which is within the *Mortmain Act*."

(1) 10 Hare, 446.
(2) 3 Ch. D. 189.
(3) 11 Beav. 507.
(4) 3 Ch. D. 190.
(5) Law Rep. 2 Ch. 201.

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Then it has been said in the course of the argument that the decision of Vice-Chancellor *Hall* is directly at variance with that. In some sense it is. Vice-Chancellor *Hall* does not seem to have adopted the reasoning of the Vice-Chancellor *Malins*, but then it must be borne in mind that his attention was not called to, or at least he does not express any opinion upon, the plain and manifest distinction between a trading company and a turnpike road, where there is no property whatever in the trustees or anybody else, or a dock or harbour company, where there is no interest, except that the shareholders are to take what profit may be derived from the thing created, either by subscription or otherwise—as in the *Aberystwith* case, which was then before him, and which also was not a trading concern. It cannot be denied that, if it is true that this is an interest within the *Mortmain Act*, it would furnish the means of destroying a trading concern. It was not the intention of the Legislature that any such powers should exist in any creditor of a trading company or any other person. This is a debenture charging the undertaking, which I understand and construe to mean the trade the Legislature has authorized the company to carry on—that and nothing else. All that is necessary to carry on the trade is vested in them—but vested in them for that purpose; not for holding it in mortmain; not for any of the mischief which it was sought to prevent by the law of mortmain; not anything but what is consistent with the ordinary transactions of human life, and particularly with the management of railway companies. They are entitled to the undertaking of the concern; they give to the mortgagee certain authority and power and interest by assigning to him the tolls and rates, as was done in the case of *Gardner* v. *London, Chatham, and Dover Railway Company* (1). The extent of that right is defined and settled by a most deliberate and exhaustive judgment; and, without saying that the conflict between Vice-Chancellor *Hall* and Vice-Chancellor *Malins* is irreconcilable, because I do not think it is, if regard is paid to the difference in the two subject-matters with which they had to deal—but if it were so, then, in the obedience which I feel bound to pay to the decision of *Gardner* v. *London, Chatham, and Dover Railway Company*, I should feel myself

(1) Law Rep. 2 Ch. 201.

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constrained to prefer the judgment of Vice-Chancellor *Malins* to that which has been more recently pronounced by Vice-Chancellor *Hall*. It is quite unnecessary for me to say, feeling as I do unbounded respect for both those learned Judges, how glad and how ready I should be to follow what I found to be a clear decision of either of them. For these reasons, I am of opinion that the debenture is not an interest in land.

Judgment.

The costs of raising the question in Chambers, and of the adjournment into Court, will be paid out of the fund as between solicitor and client, there being a conflict of decision upon the point.

Solicitors: *Masterman, Hughes, & Co.; Bateman Harcourt; The City Solicitor; Young, Jackson, & Beard.*

BENNETT *v.* HOULDSWORTH.

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[1872 B. 230.]

Settlement and Will—Election.

A settlor, on the marriage of his daughter, covenanted that, immediately after his death, a share, which in the event became one-third, of all and singular his real and personal estate should be settled for the benefit of the daughter, her husband, and their children, in equal shares. One of the four children of the marriage, a daughter, died in the settlor's lifetime, leaving a husband, who also died in the settlor's lifetime, and two infant children, who survived the settlor.

The settlor made a will, whereby, after directing payment of his debts, he disposed of personal chattels, gave a number of legacies, and, amongst others, a legacy of £4500, and part of the residue of his estate, to his nephews and nieces, and his two infant great-grandchildren above mentioned, in equal shares:—

Held, that the liability under the covenant was not a debt to be paid before the division of residue, and that the infants were bound to elect between the benefits under the settlement and under the will.

Chichester v. *Coventry* (1) distinguished.

FURTHER CONSIDERATION.

Statement.

By an indenture dated the 17th of April, 1833, being the settlement made prior to the marriage of *Edward Bennett* and *Elizabeth*

(1) Law Rep. 2 H. L. 71.

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Nicholson, James Nicholson, the father of the intended wife, covenanted with trustees that, immediately after the decease of him, *James Nicholson*, "all and singular the real and personal estate and assets whatsoever whereof he or any person or persons in trust for him shall be seised, possessed, or entitled in possession or expectancy or otherwise howsoever," should be divided into so many equal parts or shares as *James Nicholson* should at the time of his decease "leave children lawfully begotten or issue of such children as shall have died in his lifetime, such issue being reckoned *per stirpes* only and not *per capita*," and that he would by deed or will give, devise, bequeath, settle and assure one of such equal parts or shares to such and the same uses and for such and the same trusts for the benefit of *Edward Bennett* and *Elizabeth*, his intended wife, and the issue of their marriage, if they or either or any of them should be living at the death of *James Nicholson*, as were thereinbefore limited, declared, and expressed, of and concerning a certain estate, hereditaments, and premises thereinbefore described, or as near thereto as the difference between real and personal estate, the deaths of parties, and other intervening accidents would admit. These trusts were for the benefit of *Elizabeth Nicholson* for her separate use, for life, then for *Edward Bennett* for life, and after the decease of the survivor, for all and every the children and child of the marriage in equal shares, absolutely.

There were four children of the marriage, one of whom, *Edward Powlett Bennett*, died in the lifetime of his father, an infant.

On the 14th of December, 1851, *Edward Bennett* died, leaving three of his children surviving, namely, *Ada Victoria Bennett*, *Campbell Edward Bennett*, and *Harry Bennett*.

By his will, dated the 8th of January, 1850, *Edward Bennett* devised and bequeathed all his real and personal estate to his wife, "in perfect persuasion and confidence that she will use it in every respect for the support and maintenance of" their children; but in case she should die without making any will or appointment of the same, then he directed the same or the residue thereof to be divided between such children as he might have at his decease, share and share alike.

On the 7th of February, 1852, administration was granted to

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Elizabeth Bennett. The estate of *Edward Bennett* was insolvent, and had been administered in the Court of Chancery; the creditors being still unsatisfied.

On the 30th of December, 1861, *Ada Victoria Bennett*, having married *Roger Melladew*, died, leaving two infant children, *John* and *Jane Elizabeth Melladew.*

On the 5th of June, 1862, *Elizabeth Bennett*, the widow, died, having married *John Birch Melladew*, who was still living. He had become the legal personal representative of *Roger Melladew*, who was his son.

Elizabeth Bennett made no bequest or appointment of the fund. In 1866 *Campbell Edward Bennett* was adjudicated a bankrupt.

On the 5th of August, 1871, *James Nicholson*, the settlor, died, having by his will, dated the 13th of April, 1870, appointed *William Henry Houldsworth* and *Charles Lings* trustees and executors. He thereby gave a legacy of £100 to *Charles Lings;* and to his daughter *Sarah*, wife of *William Birch*, his household goods and other specific chattels. He then gave and devised to his trustees all and singular his real leasehold and personal estates, property and effects, of what nature or kind soever and wheresoever situate, upon trust to sell and convert, and to stand possessed of the moneys upon trust to pay all expenses incident to the trusts of the will, and his "just debts," funeral and testamentary expenses; and the following legacies: to *Sarah Birch* £2000 (reduced by codicil to £1000); to *William Birch* £2000 (revoked by codicil); to *Harry Bennett* £2000; and several legacies to nephews and nieces of £200 each. He directed his trustees to stand possessed of £4500 and the investments thereof upon trust for the use of his son *John* for life, and afterwards to be divided equally amongst testator's said nephews and nieces, and the two children of his late granddaughter, *Ada Melladew*, the said two children taking one share only between them. He further directed his trustees to stand possessed of £2000 and the investments thereof upon trust to pay the income in and towards the maintenance, education, and advancement of the two children of *Ada Melladew* until twenty-one, and on their attaining that age, to divide the sum amongst them in equal shares; in the event of the death of either under twenty-one leaving issue, such issue to take the parent's share;

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with survivorship, in case of the death of one under twenty-one without leaving issue, to the other and her issue; and in case of the death of both under twenty-one without leaving issue, to fall into the residue. He then directed the residue to be invested in certain specified securities and the proceeds paid into "the proper hands" of *Sarah Birch* for life, for her separate use; and after her death the capital to be held for the benefit of her children in equal shares; with survivorship, in case of the death of any child before his or her share became payable or divisible and without leaving issue, to the others; and in default of children, then as to £3000, part of the residue, in trust for *William Birch* absolutely; and as to the remainder upon trust for all testator's nephews and nieces and the two children of *Ada Melladew* in equal shares, and the issue of any who should be then dead, the issue taking the parents' share only.

The settlor and testator left surviving him at his decease his son *John*, who had never married; his daughter *Sarah Birch*, who had no issue; and the above-named issue of his daughter *Elizabeth Bennett*, afterwards *Melladew*. Thus, the number of shares into which his property would be divisible under the settlement was three.

On the 6th of February, 1872, *Harry Bennett* received payment of the £2000 legacy.

On the 19th of July, 1872, the bill was filed by *Harry Bennett*, on behalf of himself and all other the creditors of *James Nicholson*, deceased, against the trustees and executors of the will, alleging as follows:—

"The will of the said testator is not a performance of the said covenant . . . contained in the said indenture of settlement, and the said testator has not performed the said covenant, and the Plaintiff is entitled to stand in the position of a creditor of the estate of the said testator for a large sum in respect of the share to which, by virtue of the said covenant and the operation of the trusts of the said indenture of settlement, he is entitled of the estate of the said testator."

The bill prayed that the amount due to the Plaintiff from the estate of the testator by virtue of his covenant in the settlement

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of April, 1833, might be ascertained and "allowed as a debt due from" the testator's estate, and might be raised and paid to the Plaintiff; also that the amounts due to the other persons from the testator's estate by virtue of the said covenant might be similarly ascertained and allowed, and raised and paid; and, if necessary, for administration.

Statement.

Since the institution of the suit, the Plaintiff had become the legal personal representative of the surviving trustee of the settlement, also of his infant brother, *Edward Powlett Bennett*, and of his father, *Edward Bennett*.

The executors and trustees, by their answer filed on the 5th of October, 1872, disputed the right of the Plaintiff to stand as a creditor of the testator's estate for any sum whatever, either by virtue of the covenant or otherwise. They submitted that the Plaintiff, by accepting payment of the £2000 legacy, had elected to take under the will, and so had precluded himself from enforcing the covenant against the testator's estate.

On the 17th of November, 1874, a decree was made, whereby, after reciting that the Plaintiff did not claim the legacy of £2000 in addition to, but submitted to bring the amount into account as part of, his share under the settlement, accounts and inquiries were directed as in an administration suit.

The Chief Clerk, by his certificate, filed on the 1st of March, 1877, found, amongst other things, that the legacies given by the will amounted to £10,800; and that the said legacies had been paid, satisfied, and appropriated, and were allowed in the account of personal estate, "subject to any question of election respecting such of the legacies or shares of legacies in which the children of *Ada Victoria Melladew* are interested."

The cause now came on for further consideration.

Argument.

Sir *H. Jackson*, Q.C., and *Edmund S. Ford*, for the Plaintiff.

Ingle Joyce, for the Defendants.

Kay, Q.C., and *Begg*, for Mr. and Mrs. *Birch*:—

The provisions as to residue under the will are absolutely inconsistent with the provisions of the settlement. The Plaintiff has abandoned all claim under the will, and with regard to him no

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question arises. But the children of *Ada Victoria Melladew*, who are great grandchildren of the settlor and testator, claim one-fourth of a third of his estate under the covenant, and also to take under the will. But in this Court no one can claim under one, and also under another wholly inconsistent, instrument. In *Chichester* v. *Coventry* (1), which will be cited, there was no indication of any intention to put the parties to an election. The covenant there was to pay, not, as here, a share of uncertain amount, but a fixed sum of money. It was a specialty debt. The principle is, that if you come seeking an equity you must do equity. It may be argued that the two great-grandchildren do not take directly under the settlement, but only derivatively. Such an argument is disposed of by *Cooper* v. *Cooper* (2). The principle is, that a person cannot claim under a deed, and then under a will inconsistent with that deed.

Everitt, for other residuary legatees.

Hemming, Q.C., and *Whitley*, for the two infant children of *Ada Victoria Melladew*:—

The argument against us appears to be founded on the rule against double portions. But the Court always looks narrowly to see whether there is the alleged inconsistency. The question is, whether by "residue" the testator did not mean the residue of his estate after the covenant had been satisfied. That was held to be the construction in *Chichester* v. *Coventry*. There the dispositions made by the will were so widely different from those of the settlement, that they were held to be indications that the devise was not meant to be a satisfaction of the covenant. Here we have a much greater difference between the two sets of dispositions than existed in *Chichester* v. *Coventry*.

In *Russell* v. *St. Aubyn* (3), there was so much similarity that it was held a satisfaction must have been intended. This case is so much the reverse of *Russell* v. *St. Aubyn* that upon the reasoning of that judgment the result must be the other way.

It is said that *Chichester* v. *Coventry* is distinguishable, because there the covenant was to pay a fixed sum of money, and

(1) Law Rep. 2 H. L. 71. (2) Law Rep. 7 H. L. 53.
(3) 2 Ch. D. 398.

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hence the sum so covenanted to be paid must be treated as a debt. But an uncertain sum the subject of a covenant is as much a debt as a fixed sum.

Cooper v. *Cooper* (1) decided, not that every derivative interest may be the subject of the rule as to election, but only one sort of derivative interest. *Grissell* v. *Swinhoe* (2) is a case of an interest so derived as not to be the subject of election.

On either ground the children of the settlor's granddaughter are not put to their election.

Argument.

De Gex, Q.C., and *Macnaghten*, for the creditors' assignees of *Campbell Bennett*.

Kay, in reply:—

The whole question is, has this testator by his will disposed of three-fourths of his estate, or of the whole? If he made his will, forgetting the covenant, it is a will inconsistent with that covenant, and if so, no one can claim under both instruments.

Is it possible to say that the will disposes of three-fourths of the estate designedly, omitting the other fourth? Does the testator say, I dispose of three-fourths of the estate? or does he say, I dispose of the whole, neglecting the covenant? Suppose the testator's debts had been larger than the value of his estate, can anybody say that the estate was already disposed of, so that creditors could not come in?

The only argument is, that the claimants are creditors. How can they claim as creditors? All they can have is a decree for specific performance of the trusts of the settlement. That is not a debt. According to the argument on behalf of these claimants, they would be entitled to one-twelfth of every article he possessed in the world.

A great-grandchild may be within the law of election. In *Cooper* v. *Cooper* it was next of kin who claimed, and were put to their election.

Judgment.

BACON, V.C.:—

The main question which has been argued is, I think, not only

(1) Law Rep. 7 H. L. 53. (2) Law Rep. 7 Eq. 291.

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covered by authority, but is in itself plain enough, if there were no authority to guide the Court.

In the year 1833, a father, upon the marriage of his daughter, contracts that he will, his property being divided into three parts, settle one of those parts, either by deed or by will, in favour of that daughter and the issue of the marriage. That is in the year 1833. What took place in the interval one does not know, and it is not necessary to inquire. But in the year 1870, when that same father comes to make his will, he makes a will the terms of which are, in my opinion, impossible to misunderstand. It is a disposition by him, which I must assume he thought he had a right to make, of the entirety of his estate and effects in the manner described in the will. There is not only no mention of the settlement which had been made, but there is no allusion to the objects of the settlement, or if it could be said in any way that there is any allusion to the objects of the settlement, that would be adverse to the contention which has been raised on the part of the grandchildren, for the legacies given to them are given in terms from which one would infer that they stood in need of provision. There is a present provision for their maintenance and education, and it gives them an ultimate interest, in some contingencies, in other parts of that entire estate of which he disposes. If it stood upon the will alone, I do not think any one reading it and attending to the facts of the case could have any doubt.

Then, it is said, the testator having in his will directed that his debts should be paid in the first instance, this contract entered into by him on the marriage of his daughter constituted a debt. In my opinion, it was in no sense a debt. It is impossible to call it a debt with any strictness or regularity. It is an obligation to do a certain thing, which, if it had been done specifically, would have been no payment of any debt, but would have been a handing over of one equal fourth part of all his money, lands, and property of whatever description he had. The argument on behalf of the grandchildren, therefore, in my opinion, is not in the least helped by calling it a debt.

Then it is said that the case of *Chichester* v. *Coventry* (1) is a case which entitles the grandchildren (I call them by that name

(1) Law Rep. 2 H. L. 71.

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in this case for the sake of distinctness) to claim the performance of this obligation, and also to have the benefits under the will. Now nothing, in my opinion, can be more distinct, and nothing clearer than the reasons of the decision in *Chichester* v. *Coventry* (1). In that case there was a debt called by its proper name—a debt, and the testator there, in contracting that debt, had provided for the settlement of the money constituting the debt in a particular way; and being, as appears by the case, a man of very large wealth, when he comes to make a division of his property between his only two children, he gives one half of it to the lady upon whose marriage he contracted the debt of £10,000, and settles that in terms which he mentions there, giving the other half to the other of his only two children. There the decision was, that the debt must be paid first. There was no inconsistency. There was a difference between the provision in the settlement of the debt and the settlement of the moiety of his estate; but there was no inconsistency in the provisions. There was nothing to induce the Court to believe for one moment that the testator had not clearly in his view the knowledge of the fact that he had contracted to pay £10,000; and, in addition to that, he paid £10,000 many times over.

In this case the settlement is, in my opinion, in very plain terms. It does entitle the parties under the settlement to have one equal fourth part of the whole of the testator's estate applied upon the terms of the settlement, but it is only upon the terms of the settlement. The representative of the trustees of the settlement, who asks by this suit to have the trusts of that deed carried into execution, does not ask for the payment of any debt, but asks that the fourth part may be ascertained, and that it may be paid to him in satisfaction of the obligation contained in the settlement. In my opinion, that is a claim which cannot be resisted. It does seem to have been resisted at the hearing. The decree proceeded upon the adoption of it, and the acknowledgment of the justice of that claim. The point about the double provision is incidentally mentioned in the decree. It is not mentioned in the way of decision, because then the trustee, the Plaintiff, who was also entitled to a legacy of £2000 apparently under the will, consent-

(1) Law Rep. 2 H. L. 71.

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ing at once to give that up, felt that he could not sustain any contention in favour of having that sum, and also the share to which he was entitled under the settlement.

[His Lordship, after deciding another point, viz., that the testator's representatives were not entitled to deduct from the share of *Campbell Bennett*, now in the hands of his assignee, the amount of certain simple contract debts due from *Campbell Bennett* to the estate, for advances made to *Campbell Bennett* by the testator in his lifetime, continued:—]

All the rest seems to be pretty clear. I do not understand that there is any difficulty now that the Chief Clerk has made all the inquiries requisite. The estate is ascertained and capable of division.

The following are minutes of the decree:—

Plaintiff to bring in the £2000.

Declaration that infants are bound to elect.

Inquiry whether for their benefit to take under the will or under the settlement.

Declaration that whatever, after the election, may remain subject to the trusts of the settlement ought to be paid to the trustee of the settlement with interest from the death of the testator at 4 per cent.

Costs to be taxed both as between party and party and as between solicitor and client; costs out of the estate as between party and party of all parties, including parties attending; the difference between the solicitor and client costs and ordinary costs of the plaintiff as trustee, and of Mrs. *Birch*, to come out of his and her own fund respectively.

Proceedings as to the Plaintiff to be stayed, and further conduct of the suit given to Mr. and Mrs. *Birch*.

Liberty to apply.

Solicitors: *Rowley, Page, & Rowley; J. E. Fox & Co.*, agent for *Earle & Co., Manchester; Parker, Lee, & Ockerby; Burton, Yeates, & Hart.*

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In re CHURCH AND EMPIRE FIRE INSURANCE COMPANY.

V.-C. H. 1877 June 8.

PAGIN & GILL'S CASE.

Winding-up—Companies Act, 1867, *s.* 25—*Allotment in Consideration of future Work—List of Contributories.*

The proprietors of a newspaper agreed with an insurance company to insert a series of advertisements for the company in consideration of 100 fully paid-up shares in the company. Fully paid-up shares were accordingly allotted to them, but no contract in writing within the 25th section of the *Companies Act* of 1867 was filed at or before the issue of the shares. The newspaper proprietors sent the company a receipted bill, and subsequently duly inserted the advertisements. The company was afterwards wound up:—

Held, that there having been, at the time of the allotment, no *bonâ fide* debt due from the company to the newspaper proprietors amounting, under the principle of *Spargo's Case* (1), to payment in cash within the 25th section of the *Companies Act* of 1867, the newspaper proprietors must be placed upon the list of contributories.

ADJOURNED SUMMONS.

Statement.

In April, 1876, the secretary of the *Church and Empire Fire Insurance Company, Limited*, wrote a letter to Messrs. *Pagin & Gill*, the proprietors of the *Whitehaven Guardian*, proposing that they should advertise in their newspaper the abridged prospectus of the company, and receive in payment for these advertisements fully paid-up shares in the company. Messrs. *Pagin & Gill* accordingly agreed to insert the advertisement fourteen times in fourteen consecutive issues of their paper in consideration of £100 in 100 fully paid-up shares of £1 each. Fully paid-up shares to this amount were then allotted to them, and on the 29th of April the secretary sent them the certificates for 100 fully paid-up shares, asking in return for a receipted bill. Messrs. *Pagin & Gill* sent back a receipted bill for £100, and duly inserted the advertisements during the months of April, May, June, and July. No contract in writing within the 25th section of the Act of 1867 was filed with the Registrar at or before the issue of these shares.

In August, 1876, the company closed its office; in November

(1) Law Rep. 8 Ch. 407.

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Statement.

following it was ordered to be wound up, and the official liquidator subsequently placed the names of Messrs. *Pagin & Gill* upon the list of contributories, upon the ground that the fully paid-up shares allotted to them had not been paid for in cash within the 25th section of the *Companies Act* of 1867. There were forty-three similar cases, and this was taken as a representative case, and a summons taken out for settling the list of contributories was now adjourned into Court.

Evidence was adduced on behalf of the official liquidator to shew that, except in the case of the *Times* and some other metropolitan papers, it was not the custom of the trade for insurance companies to pay cash in advance for the issue of a series of advertisements, but only to pay after work done, and then upon reasonable, usually three months', credit: moreover, that the £100 nominal value of these shares was more than what the company would have had to pay in cash for the advertisements. On the other hand, Messrs. *Pagin & Gill* adduced evidence that £100 was a fair and reasonable price to be paid down for the issue of a series of fourteen advertisements, and that they would not have advertised the prospectus more than once without being paid in advance.

Argument.

Robinson, Q.C., and *E. Beaumont*, for the official liquidator:—

Under the 25th section of the *Companies Act*, 1867, every share in any company shall be deemed to have been issued subject to the payment of the whole amount thereof in cash, unless otherwise determined by a contract in writing duly filed. At the time these shares were allotted there was not in existence any "*bonâ fide* debt payable in money at once" from the company to Messrs. *Pagin & Gill*, so as to bring the case within the principle of *Spargo's Case* (1) and *Fothergill's Case* (2). These gentlemen could not then have sued the company for the £100, while on the other hand the company could have sued them for the full amount of the shares. An agreement to do work subsequently to the issue of shares is not equivalent to a payment in cash at the time of the issue. The case is accordingly within the 25th section of the Act, and these gentlemen must be placed upon the list.

(1) Law Rep. 8 Ch. 407. (2) Law Rep. 8 Ch. 270.

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Everitt, for Messrs. *Pagin & Gill*:— V.-C. H. 1877 PAGIN & GILL'S CASE. Argument.

The provisions of the *Companies Act*, 1867, have been complied with, for there was in effect a payment in cash for these shares within the meaning of the 25th section. Upon the invitation of the company these gentlemen contracted to do, and did, certain work for the company in consideration of the payment down in advance of an agreed sum in fully paid-up shares of the company. It was in effect a *bonâ fide* allotment of fully paid-up shares in consideration of a debt of equal amount, and these gentlemen cannot be placed upon the list: *Spargo's Case* (1); *Maynard's Case* (2); *Carling's Case* (3). The newspaper proprietors would not have inserted more than one advertisement without being paid in advance, and the £100 fixed upon was a fair and reasonable price to be paid down for the series of advertisements which were inserted. The debt due to these gentlemen must be set off against the amount, otherwise it will be a complete case of fraud. Moreover, the only contract which Messrs. *Pagin & Gill* ever entered into was a contract to take fully paid-up shares, and that being so, they cannot be forced to take, or be placed on the list as holders of, anything except fully paid-up shares: *Beville's Case* (4); *Beck's Case* (5); *Carling's Case* (6); *De Ruvigne's Case* (7).

HALL, V.C.:— Judgment.

I am of opinion that Messrs. *Pagin & Gill* are liable to be placed upon the list of contributories of this company. There have been two main defences raised. The first is that the provisions of the *Companies Act*, 1867, requiring payment in cash have in effect been complied with, and therefore that these gentlemen are not liable to be placed upon the list of contributories. The 25th section of the Act provides that every share shall be deemed to have been issued subject to payment of the whole amount thereof in cash, and it is said that the transaction in the present case amounts in substance to a payment in cash, the bargain or arrangement having been that those gentlemen should take the shares as

(1) Law Rep. 8 Ch. 407.
(2) Ibid. 9 Ch. 60.
(3) 1 Ch. D. 115.
(4) Law Rep. 7 Eq. 11.
(5) Ibid. 9 Ch. 392.
(6) 1 Ch. D. 115.
(7) 5 Ch. D. 306.

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payment for the work of advertising the company. That, however, seems to me to be the very case which this Act of Parliament was meant to meet. In *Spargo's Case* Lord Justice *James*, referring to *Pellatt's Case*, says (1): "The object of the section was, I apprehend, to prevent such contracts as had been before the Court in *Pellatt's Case* (2) and *Elkington's Case* (3), in which a man was to take shares and to pay for them by supplying goods when wanted. It was considered that there was mischief in collateral contracts of that kind, which deprived creditors of the remedies which they would expect to have against persons whose names they saw registered on the list of shareholders."

It is, however, argued, that the form of the transaction in the present case amounts to payment in cash, so as to bring it within the decision in *Spargo's Case*. Messrs. *Pagin & Gill* having been asked to do certain work for the company, viz., that of advertising it, and having agreed to do so on receiving payment in fully paid-up shares, the company, as part of the transaction, sent them certificates of the shares as fully paid up in payment at once for the advertisements, which it had been agreed should be issued for the £100, without waiting for the insertion of the fourteen advertisements; and thereupon Messrs. *Pagin & Gill* gave an immediate receipt for the money for the advertisements as having been actually paid. This, it is said, ought, under the circumstances, to be treated as a payment in advance of the money so agreed to be paid. I do not consider, however, that this is the true nature of the contract between the parties, or that that was the real agreement. The real agreement was based upon the letter which was written, in which it was stated that these parties should do the work of advertising and take fully paid-up shares in payment for that work. That being so, it seems to me that if I were to treat this transaction as amounting to a payment in cash, I should, in fact, be giving effect to a mere device for the purpose of evading the provisions of the statute. That was not the real transaction; and if the company had brought an action for payment of calls in respect of these shares, I do not think that these gentlemen could have successfully set up a plea of payment; at all events, not

(1) Law Rep. 8 Ch. 412. (2) Law Rep. 2 Ch. 527.
(3) Law Rep. 2 Ch. 511.

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until the fourteen weeks had expired, even if they could then. Then, as it could not be pleaded during that time, nothing took place afterwards which amounted to a payment in cash as between the parties upon a settlement of account. I cannot consider the transaction as a settlement of account by anticipation, or as a payment in advance of the money which would have been paid after the advertisements had been published. To do so would be, in fact, to adopt or sanction a scheme for the purpose of bringing a contract obnoxious to the provisions of the Act of Parliament within the saving clause contained in that Act. It is important upon this point to observe what was said by Lord Justice *James* in *Spargo's Case* (1) as to what would amount to a plea of payment. He says: "If it came to this, that there was a debt in money, payable immediately by the company to the shareholders, and an equal debt payable immediately by the shareholders to the company, and that each was accepted in full payment of the other, the company could have pleaded payment in an action brought against them, and the shareholder could have pleaded payment in cash in a corresponding action brought by the company against him for calls." That never occurred here, and therefore I think that the present case is not governed by *Spargo's Case*, and that these gentlemen must be placed upon the list.

But, then, Mr. *Everitt* has contended, further, that the agreement entered into by these gentlemen was that they should have fully paid-up shares, and that there is, therefore, no authority whatever for putting them upon the register, otherwise than as holders of fully paid-up shares. But none of the authorities which have been referred to at all approach such a case as the present, where the contract and what took place between the parties amounted to this, that the shares were immediately issued to a person who must be deemed to have had a knowledge of the law that such shares must be taken to be payable in cash.

Then with regard to the cases which have been cited. In *Beville's Case* (2) the transaction was prior to the Act of Parliament. There the shareholder subscribed the memorandum of association for fully paid-up shares which had no existence and which the company had no power to give him; and under those circum-

(1) Law Rep. 8 Ch. 412. (2) Law Rep. 7 Eq. 11.

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V.-C. H. 1877 PAGIN & GILL'S CASE. Judgment.

stances it may well be that the subscription to the memorandum of association was deemed a subscription to nothing at all. In *Carling's Case* (1) there was no contract at all between the shareholders and the company. The shareholders had taken certain shares from another person upon a representation made by that person that they were fully paid-up shares—that being a bargain apparently come to between that person and the company; but there was no bargain between the company and the shareholders at all. The shareholders said, "We only contracted for fully paid-up shares." Under these circumstances, therefore, the shareholders could not be held liable for anything except that which answered the description of the thing which they had bought or taken from the person with whom they were contracting. The same observation, I think, applies to *De Ruvigne's Case* (2). The party there never agreed to take anything but paid-up shares, and he was in the position of a stranger taking shares upon the nomination of a person with whom alone the company could contract. It seems to me, therefore, both grounds of defence fail in this case, and that these gentlemen must be placed upon the list of contributories. The costs will come out of the estate.

Solicitors: *Pawle, Fearon, & Coldham; Johnston & Harrison.*

V.-C. H. 1877 Jan. 12.

In re CAMPBELL'S POLICIES.

Marriage Settlement—Wife's after-acquired Property—Covenant to settle Property from particular Source—Determination of Coverture—Property acquired after.

A covenant to settle after-acquired property will, in the absence of indications of a contrary intention, be read as limited to the duration of the coverture, and this though the covenant relates only to property from a specified source.

Statement.

BY a deed-poll executed in contemplation of the marriage of *Harriet Campbell*, a minor (one of the three children of Colonel *Henry Dundas Campbell* and *Anne Maria* his wife), with *Alexander Shank*, and dated the 1st of April, 1847, Colonel *Henry Dundas*

(1) 1 Ch. D. 115. (2) 5 Ch. D. 306.

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Campbell, in exercise of a power contained in his marriage settlement, appointed a one-third share of the moneys to be received under certain policies of assurance on his life to *Harriet Campbell*, subject to the life interest of her mother, *Anne Maria Campbell*, therein. By the marriage settlement of even date with the deed-poll, after reciting that on the treaty for the marriage it had been agreed that the appointed share "and also all the parts or shares and interest whatsoever to which the said *Harriet Campbell* or the said *Alexander Shank* in her right at any future time or times should or might become entitled under or by virtue of the said settlement made upon the marriage of the said *Henry Dundas Campbell* and *Anne Maria* his wife" should be settled in manner thereinafter mentioned, it was, in pursuance of the agreement and in consideration of the marriage, witnessed as follows:—

"It is hereby declared and agreed by and between the parties to these presents, and he the said *Alexander Shank* for himself, his heirs, executors, and administrators, doth hereby covenant with" (the trustees) "that if the said intended marriage shall take effect he the said *Alexander Shank* and all other necessary parties shall and will as soon as the case will admit, at the costs and charges of the said *Alexander Shank*, his heirs, executors, and administrators, by such assignments and assurances in the law as by" (the trustees) "shall be required, assign all that" (the appointed share) "and also all the parts or shares or interest whatsoever to which the said *Harriet Campbell* or the said *Alexander Shank* in her right at any time or times shall or may become entitled under or by virtue of the said settlement made upon the marriage of the said *H. D. Campbell* and *Anne Maria* his wife, unto, and make, do, and execute, or cause and procure to be made, done, and executed, all such acts, deeds, assignments, assurances, matters, and things which shall be necessary for vesting the interest in possession therein in" (the trustees) "upon the trusts hereinafter contained."

The settlement then declared that the trustees should hold the said third share of the policy moneys, and also "all other parts and shares and interest whatsoever to which the said *Harriet Campbell* or the said *Alexander Shank* in her right at any time or times shall or may become entitled by virtue of the said settlement made upon

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V.-C. H. 1877 — *In re* CAMPBELL'S POLICIES. — Statement.

the marriage of the said *Henry Dundas Campbell* and *Anne Maria* his wife hereinbefore also agreed and covenanted to be assigned" when the same respectively should have been assigned in pursuance of the covenant, upon trust as soon as might be after the same should have become payable, to call in, receive, and invest the same, and to pay the annual produce to *Alexander Shank*, the husband, for life, and after his death to *Harriet Campbell* for life, and after the death of the survivor upon ordinary trusts in favour of their children.

This settlement was adopted by Mrs. *Shank* after she came of age. Mr. *Alexander Shank* died in 1866; his widow, in March, 1872, married Captain *Hale*, and by a settlement executed upon that marriage, and comprising other property, it was, amongst other things, agreed and declared that all the real and personal property (if any) not thereby settled to which Mrs. *Shank* at the time of that marriage or she or Captain *Hale* in her right should be or become entitled, whether in possession or reversion, should, at the costs of the trust estate, be assured to and vested in the trustees thereof upon certain trusts thereby declared.

In April, 1872, Colonel *Campbell* died, having by his will, dated the 11th of March, 1869, at which time Mrs. *Hale* was the widow of Mr. *Shank*, after reciting his own settlement and his appointment to her of the one-third share of the policy moneys, appointed and bequeathed to her for her sole and separate use, the remaining two-thirds of the policy moneys, subject to the life interest of his wife Mrs. *Campbell* therein.

In May, 1876, Mrs. *Campbell* died, and the question having arisen whether the trustees of the *Shank* settlement or those of the *Hale* settlement were entitled to the two-thirds appointed and bequeathed by Colonel *Campbell's* will, the trustees of the *Campbell* settlement paid the amount representing those two-thirds into Court under the *Trustee Relief Act*.

Argument.

Dickinson, Q.C., and *Colt*, for the trustees of the *Shank* settlement:—

There are no words in the covenant contained in the *Shank* settlement to restrict its operation to the duration of the coverture, and the Court will not introduce words for that purpose. It is not the ordinary case of a covenant to settle after-acquired pro-

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perty of the wife, for the source is specified from which the property is to come. The marriage contract embraced everything coming under the *Campbell* settlement either by appointment or in default, so that the time at which the wife became entitled to the property is of no moment, and the source from which she derives it is alone to be regarded. A strict construction of the language is the only one which will carry out the intention of the parties, and the trustees of the *Shank* settlement are accordingly entitled.

Robinson, Q.C., and *Worsley Knox*, for the trustees of the *Hale* settlement:—

It is now the settled rule that a covenant to settle the after-acquired property of the wife must, in the absence of expressions shewing a contrary intention, be read as if the words "during the coverture" were inserted therein: *In re Edwards* (1); *Dickinson* v. *Dilwyn* (2); *Carter* v. *Carter* (3). The reason for, and primary object of, such covenants is to prevent the wife's after-acquired property from falling under the sole control of the husband: *Dickinson* v. *Dilwyn*. And this being so, the circumstance that there is a reference to the source from which the after-acquired property is to come does not take the covenant out of the operation of the general rule. Moreover, this is not a covenant or agreement that all necessary parties shall settle, but the form of the covenant shews that the property to be assigned was property to the assignment of which the husband would be a necessary party; he was to concur in everything that was to be done, and all was to be done at his expense, so that the covenant could not be intended to operate in a case in which his concurrence would be impossible, or even unnecessary. In any case this property cannot be bound by the covenant, for it was appointed to the lady for her separate use: *Ramsden* v. *Smith* (4); and here, again, the frame of the settlement lends force to the contention, for the first life estate is given to the husband, so that if the property were bound and had fallen in during the coverture, and the lady had predeceased Mr. *Shank*, she would never have had any enjoyment of it at all, though it was given to her for her separate use.

(1) Law Rep. 9 Ch. 97.
(2) Ibid. 8 Eq. 546.
(3) Law Rep. 8 Eq. 551.
(4) 2 Drew. 298.

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V.-C. H. 1877 *In re* CAMPBELL'S POLICIES. Argument.

B. B. Rogers, W. W. Karslake, and *G. Harris Lea,* for other parties.

Dickinson, in reply:—

The argument is, that property specifically settled is not to be so treated. *Dickinson* v. *Dilwyn* (1) shews that there is a distinction between property coming from a specific source and after-acquired property generally, for the £100 which came under the father's will was held subject to the covenant. This is a covenant to the benefit of which the children of the *Shank* marriage, who are eight in number, are entitled; they have got one-third of this property, and why should they not have the other two-thirds for which their father contracted? As to the frame of the covenant, if Mr. *Shank* could assign he was to do so, if not, all other necessary parties were. All that was decided in *Ramsden* v. *Smith* was that where a man covenants to do an act the covenant only applies to property which he can affect.

Judgment.

HALL, V.C.:—

I am of opinion that the two-thirds of the policy moneys appointed and bequeathed by the will of Colonel *Campbell* are not comprised in the *Shank* settlement, but are comprised in the *Hale* settlement. The arguments which have been addressed to me in favour of construing a clause like this to include property coming to the lady after the determination of the coverture, are not sufficient to induce the Court so to extend its operation. On the contrary, I think that such a construction would in all probability not carry out the intention of the parties. It might have the effect of rendering impossible any settlement upon the children of a second marriage, and of leaving them totally unprovided for. A settlement upon a first marriage having such operation would be in the highest degree improvident; for the lady might soon become a widow, and thus, if the covenant were held to extend over the whole period of her life, all her fortune might go to the single child of a first marriage, to the entire exclusion of numerous children of a subsequent marriage. Such general observations as have a bearing upon the case are therefore in favour of restricting

(1) Law Rep. 8 Eq. 546.

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the operation of the covenant to the continuance of the coverture which occasioned the settlement. Then as to the authorities. It has been established by the Court of Appeal that a covenant to settle the after-acquired property of the wife must, in the absence of words shewing a contrary intention, be read as if the words "during the coverture" had been inserted therein; and is there anything to take the present case out of the operation of that general rule? The only thing is that a specific property comprised in a certain settlement is referred to, and the covenant extends to a further share to which the wife might become entitled from the same source. I do not see, however, for what sound reason I can give to the covenant a construction at variance with the general rule, merely because a specific property is referred to in it. Upon true principles of construction, it should be equally limited, and a construction so limiting it derives additional force from the language of the clause itself, according to which all the acts agreed and covenanted to be done are to be done with the concurrence of the husband and at his cost. I give no opinion as to whether property given to a lady for her separate use would be bound by such a covenant, in cases where the words of the covenant are sufficiently large to embrace the wife as one of the parties to do the requisite acts, or where the agreement to do the acts is general, without specifying by whom the acts are to be done. In *Ramsden* v. *Smith* (1), property given to the lady for her separate use was held not to be included, because from the language of the covenant all the acts which were to be done were either acts to be done by the husband alone, or by those he had a right to compel, or acts to the doing of which his concurrence was necessary.

In this case I hold that the two-third shares in question are not bound by the covenant contained in the *Shank* settlement, but are comprised in the *Hale* settlement, and must be dealt with accordingly.

Solicitors: *Combe & Wainwright; W. & A. R. Ford; Hardisty & Rhodes.*

(1) 2 Drew. 298.

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V.-C. H.
1877
March 10.

In re SMITH, DECEASED.
HUTCHINSON *v.* WARD.

[1876 H. 684.]

Practice — Judicature Act, 1873, *s.* 64 — *Rules of Court*, 1875, *Order* XXXV., *rr.* 1, 1*a*—*District Registry—Chancery Action in—Trial before the Judge in London—Powers of District Registrars.*

Notwithstanding Rules of Court, 1875, Order XXXV., rule 1a, Chancery actions commenced in District Registries ought to be tried in *London* before the Judge of the Chancery Division to whom they have been assigned.

District Registrars have no power to appoint receivers, direct banking accounts to be opened, and money to be paid in to those accounts; nor have they any power to take accounts directed by the Judge in actions commenced in the District Registries, unless the judgment specially directs them so to do.

Statement. THIS was an administration action commenced in the *Bradford* District Registry, and all the proceedings in the action up to and including notice of trial had been taken in that registry.

Notice had been given for trial of the action before the Vice-Chancellor in *London*, and it now came on accordingly.

Argument. *Morshead*, for the Plaintiff:—

By the 64th section of the *Judicature Act* of 1873, writs of summons are to be issued by District Registrars when thereunto required, subject to the Rules of Court for the time being, and unless any order to the contrary shall be made by the Court, all such further proceedings as may and ought to be taken, down to and including entry for trial, or (if the Plaintiff is entitled to sign final judgment or to obtain an order for an account by reason of the non-appearance of the Defendant) down to and including final judgment or an order for an account, may be taken before a District Registrar, and recorded in the District Registry in such manner as may be prescribed by Rules of Court.

Then by Rules of Court, 1875, Order XXXV., rule 1, it is provided in similar terms that in actions commenced in District Registries, except where otherwise provided by the Rules, or the Court or a Judge should otherwise order, all further proceedings

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should be taken in the District Registry, down to and including the entry for trial of the action, or if the Plaintiff is entitled to sign final judgment or to obtain an order for an account by reason of the default of the Defendant, then down to and including such judgment or order. And in *Irlam* v. *Irlam* (1) your Lordship held that District Registrars had no power to make a decree even by consent, and that under Order XXXV., rule 1, they could only enter judgment or make an order for an account in cases where the Defendant had made default in appearance.

Since the decision in *Irlam* v. *Irlam*, however, a new rule, 1a, has been substituted for rule 1 of Order XXXV., by which, "where an action proceeds in the District Registry, all proceedings, except where by any of the rules of the Supreme Court it is otherwise provided or the Court or a Judge shall otherwise order, shall be taken in the District Registry, down to and including final judgment; and every final judgment and every order for an account by reason of the default of the Defendant or by consent, shall be entered" in manner therein mentioned. I therefore submit the question whether, having regard to that substituted rule, this action ought not to be heard at *Bradford*.

Newton Smart, for the Defendant, did not object to the trial taking place in *London*.

HALL, V.C.:—

I think that notwithstanding the wording of rule 1a of Order XXXV., the action has been properly set down for hearing before me; and I adhere to my decision in *Irlam* v. *Irlam*. With reference to the proceedings in District Registries, I have lately observed that District Registrars have in many instances adopted the course of themselves appointing receivers, and of directing banking accounts to be opened, and money to be paid in to those accounts. I desire it, however, to be known that such proceedings are irregular, and that in any case which may come before me I shall so treat them; and, further, that moneys paid in to an account in pursuance of an order made by a District Registrar only will be so paid in at the personal risk of everybody concerned, including

(1) 2 Ch. D. 608.

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V.-C. H. 1877 *In re* SMITH, DECEASED. HUTCHINSON *v.* WARD.

the District Registrars themselves. I have also to observe that the District Registrar is not to take accounts directed by a judgment pronounced by a Judge in an action commenced in the District Registry unless the judgment expressly directs him to do so.

Solicitors: *M. K. Braund; Parkers.*

V.-C. H. 1877 *March* 15.

PARSONS *v.* HARRIS.

[1876 P. 191.]

Practice—Rules of Court, 1875, *Orders* XIII., *r.* 9; XIX., *r.* 6; XXIX., *r.* 10; *and* XL., *r.* 11—*Co-Defendant served, but not appearing.*

Where one of several Defendants served has not appeared, while the others have appeared and delivered defences, the Plaintiff may move for judgment, as against the Defendants who have delivered defences, under Rules of Court, 1875, Order XL., r. 11, upon admissions, and as against the defaulting Defendant under the combined effect of Orders XIII., r. 9, and XXIX., r. 10; but as against the latter the action must be set down on motion for judgment, and in both cases two clear days' notice of motion must be given.

Statement.

THIS was an action for partition and recovery of land to which there were several Defendants. All the Defendants had been served with the writ, and all but one had appeared and delivered their defences; that one had not appeared.

The defences delivered contained sufficient admissions to entitle the Plaintiff to an order for sale instead of partition.

The Plaintiff now moved, against the Defendants who had appeared and delivered defences, under Rules of Court, 1875, Order XL., rule 11, as upon admissions by them in the pleadings, and against the Defendant who had not appeared under the combined effect of Orders XIII., rule 9, and XXIX., rule 10, for the usual judgment in a partition action, without prejudice to the trial of the ejectment issue.

The notice of motion had not, however, as against the defaulting Defendant, been served by being filed with the proper officer in time to give the two clear days' notice required by Order LIII., rule 4.

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V.-C. H. 1877 PARSONS v. HARRIS. Argument.

Dickinson, Q.C., and *Oswald*, for the Plaintiff, in support of the motion:—

In *Morton* v. *Miller* (1) the Court of Appeal held that a notice of motion for judgment may be served upon a Defendant who has not appeared, by being filed with the proper officer under Order XIX., rule 6; and in *Gillott* v. *Ker* (before the Master of the Rolls, March 9, 1876) the Master of the Rolls held that as against a defaulting Defendant the action may be set down on motion for judgment without previous notice of motion, while in *Bridson* v. *Smith*, which came before your Lordship on the 3rd of March, 1876, your Lordship directed an action to be set down on motion for judgment against three Defendants who were in default; and that the Plaintiffs should be at liberty to give notice of motion for judgment against them, for the same time as their motion against the other Defendant with regard to whom they were in a position to move upon admissions. We are accordingly entitled to what we ask, subject only to the difficulty of our having given insufficient notice to the defaulting Defendant, if notice is required.

W. Pearson, Q.C., and *Millar*, for some of the Defendants:—

Eddis, Q.C., and *H. L. Fraser*, for other Defendants.

Judgment.

HALL, V.C.:—

I think that following *Bridson* v. *Smith* the motion can be made against all the Defendants under the combined effect of the Orders XL., rule 11, XIII., rule 9, and XXIX., rule 10; but I also think that although a party has neither appeared nor put in a defence, it cannot be said that he ought not to have notice of what is going to be done; accordingly, as there has been an insufficient notice with regard to the Defendant who has not appeared, the motion must stand over for a week, and a fresh notice must be filed with the proper officer. I will therefore give leave to amend the notice of motion so as to give notice for the next motion day, and as so amended it must be served upon the defaulting Defendant by being filed with the proper officer two clear days before next motion day. Then, as against that De-

(1) 3 Ch. D. 516

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V.-C. H. 1877 PARSONS v. HARRIS.

fendant, you must set down the action on motion for judgment in pursuance of the general directions issued by the Master of the Rolls and the Vice-Chancellors in December, 1876 (1), though you need not do so as against the others, for under those general directions an action need not be set down as regards Defendants against whom the Plaintiff is moving upon admissions under Order XL., rule 11.

Solicitors: *Lovell, Son, & Pitfield*, agents for *R. S. Hawkins*, and for *Dayman & Walsh, Oxford; Watson, Sons, & Room.*

V.-C. H. 1877 April 21.

Ex parte WINDER.

Railway Company—Lands Clauses Consolidation Act, 1845, *ss.* 69, 75, 76, 77, 79—*Taking of Land—Compulsory Powers—Trespasser—Title by Possession—Payment of Purchase-money into Court—Statute of Limitations.*

A railway company agreed to purchase for £600 the fee simple of lands, of which *W.* was the true owner, from *H.*, who was in possession of them. Afterwards finding that *H.* had only a possessory title of 19½ years, they paid the £600 into Court to the account of "the party interested" therein, took possession, and executed a deed-poll under the 77th section of the *Lands Clauses Consolidation Act*, 1845, reciting their desire that the land should vest in them for all the estate of *H.*, and purporting to vest in themselves the fee simple of the lands. No claim was made on behalf of *W.* either to the land or the purchase-money until after the expiration of twenty years from the time when *H.* had taken possession. Upon petition by persons claiming under *H.* for payment out to them of the £600 in Court:—

Held, as against the representative of *W.*, that the Petitioners were entitled to the £600, as being the money which the company had contracted to pay for the purchase of *H's* interest in the lands.

Statement.

PETITION.

In 1848 *T. Hollingsworth* entered into negotiations with *W. C. Wright* for the purchase of a piece of land in the parish of *Prescot*, in *Lancashire*, called *Sweet Tooth Field*, which contained 1A. 0R. 26P., and adjoined certain property which *Hollingsworth* had shortly before bought from *Wright*. These negotiations fell through. In December, 1849, *Wright* was arrested and committed

(1) See Weekly Notes (Miscellaneous), Feb. 3, 1877, p. 58.

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to prison for debt, and by an order of the Court for the Relief of Insolvent Debtors made on the 29th of January, 1850, all his real and personal estate became vested in *Samuel Sturgis*, the provisional assignee of the estates and effects of insolvent debtors.

In the same year (1850) *Hollingsworth* took possession of the above-mentioned piece of land, which was of a barren nature and untenanted, and he continued in uninterrupted possession of it for 19½ years, until November, 1869.

On the 21st of January, 1869, the *London and North Western Railway Company*, requiring this piece of land for the purposes of their undertaking, entered into an agreement with *Hollingsworth* to purchase from him the fee simple of it for the sum of £600. As *Hollingsworth* was, however, unable to make out his title, the company, on the 18th of July, paid the £600 into Court under the *Lands Clauses Consolidation Act*, 1845, to the account of "the party interested in a certain piece of land situate," &c., "and now in the occupation of *Thomas Hollingsworth*." In November, 1869, the company took possession of the land; and on the 14th of January, 1870, they executed a deed-poll under the 77th section of the *Lands Clauses Consolidation Act*, 1845. This deed recited that the company, requiring the land, had made inquiries as to the person in possession, and had ascertained that *Hollingsworth* then was and for some time past had been in receipt of the rents and profits; it then recited the agreement with him of the 21st of January, 1869; that he had failed to make out a title to the fee simple; that the company had accordingly paid the £600 into Court under the Act to the account aforesaid, and that the company were desirous that the land in question "should vest absolutely in them for all the estate and interest of the said *T. Hollingsworth* therein"; and the deed then declared in the usual way that the land in question was the land in respect of which the £600 had been paid in, and that upon execution of those presents the same land should vest in them in fee simple.

Hollingsworth had, in 1866, entered into an agreement to sell half his interest in this piece of land to a Mr. *Greenough*; and in 1871 two petitions were presented, one by *Hollingsworth* and the other by *Greenough*, for the payment out of the £600 in Court.

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Both these petitions were, however, dismissed without costs, owing to disputes as to the validity of *Greenough's* agreement and the absence of evidence as to the interest of *Wright*.

Statement.

In November, 1875, *Hollingsworth* died, having by his will constituted *G. T. Winder* his universal legatee and executor; and *Winder*, having admitted the interest of *Greenough* to a moiety of *Hollingsworth's* interest in the piece of land, now presented his petition for the payment out of the £600 in Court to himself and *Greenough* in equal moieties. This petition was served upon the railway company, upon *Greenough*, and upon Mr. *Duncan Stewart*, the provisional and official assignee and receiver, in whom the estates formerly vested in Mr. *Samuel Sturgis* (since deceased) were vested by the *Bankruptcy Repeal and Insolvent Court Act*, 1869.

It appeared that *Wright* had left *England* many years ago, and had not been since heard of, and that no claim by him or his assignees had ever been made, either to the land or the money, until this petition was presented.

Argument.

Dickinson, Q.C., and *Bury*, for the Petitioner *Winder*:—

At the time the company took this land and paid the purchase-money into Court *Hollingsworth* had been in possession for 19½ years, and in another six months his title, by the operation of the *Statute of Limitations*, would have become good against all the world. During the ensuing six months the rightful owner might have claimed the land or the money, but he did neither, nor did he make any claim at all for several years afterwards. Meanwhile *Hollingsworth's* title became absolute, for the payment in under an Act passed for purposes of general public benefit cannot be held to have stopped the operation of the *Statute of Limitations*, so as, in effect, to deprive a man of property which, but for its being required by the railway company, would have been absolutely his in six months. Under the *Lands Clauses Consolidation Act*, 1845, s. 79, the party in possession is to be deemed to be the owner, and the company dealt with *Hollingsworth* as such. The payment in could not affect his title, for the purchase-money paid in was only the equivalent of the land in respect of which it was paid in; and it has been decided that pro-

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ceedings under the *Lands Clauses Consolidation Act* are not to have the effect of disturbing any one in his enjoyment of the land or its equivalent; and that the interest of the party in possession can only be defeated by legal process: *In re Perry's Estate* (1); *In re St. Pancras Burial Ground* (2); *Ex parte Webster* (before Vice-Chancellor *Wood*, June 23, 1866). The interest of a trespasser is descendible, and the true owner alone can put an end to it: *Asher* v. *Whitlock* (3). The Petitioner is accordingly entitled to one-half of the fund in Court.

Hastings, Q.C., and *Hunter*, for the executors of *Greenough*:—

The title of the assignee in insolvency of *Wright* accrued in 1850; he made no claim for more than twenty years, and his right became absolutely barred in 1870 under sect. 2 of the *Statute of Limitations*; he could therefore maintain no action of ejectment in respect of this land, and this shews that he has no title to the purchase-money. He could not now recover it if it had been paid to *Hollingsworth* instead of into Court.

Eddis, Q.C., and *A. G. Langley*, for *Stewart*, the assignee of *Wright*:—

This money was paid in to the account of the party interested because *Hollingsworth* had failed to make out a title. At the time it was so paid in *Hollingsworth* was not the true owner and *Wright's* assignee was. *Hollingsworth* had only an incomplete possessory title; the possession of the Court must have the effect of keeping the money in the same position in which it was when it was paid in, and so it enures for the benefit of the true owner and not of the wrongdoer. There is no case in which an incomplete possessory title by a trespasser on land has been subsequently perfected in his favour by the possession of the Court of the purchase-money; and the true owner at the time the money was paid must be held entitled to it. The payment in put an end to the running of time under the statute, and it is perfectly competent for the Court now to declare that the true owner is entitled to the estate, or to the money representing the estate, which is in its own

(1) 1 Jur. (N.S.) 917. (2) Law Rep. 3 Eq. 173.
(3) Law Rep. 1 Q. B. 1.

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V.-C. H. 1877

Ex parte WINDER.

possession: *Dixon* v. *Gayfere* (1); *Ex parte Freemen of Sunderland* (2); *Brandon* v. *Brandon* (3).

Argument.

Speed, for the company:—

In any case, the railway company, who have had to pay their own costs of the two previous petitions which have been dismissed without costs in this matter, ought to have their costs on this petition.

Bury, in reply.

Judgment.

HALL, V.C.:—

The question in this case is, I believe, an entirely new one. It required argument, and it has been well argued. It required consideration, and I have endeavoured to give it consideration. It is a question arising upon the provisions of the *Lands Clauses Act* with reference to making titles to railway companies and paying money into Court, but as those provisions have from time to time in the course of my experience been very much considered by me, I do not think it necessary to defer giving my judgment upon the case.

As a reasonable foundation for dealing with the case, we must, I think, start with this principle, that as far as we can, in applying these sections, we must not let the compulsory taking of the land by the company do injustice to any person who may be interested in the property which the company is authorized to take.

In this case the party who claims to have the fund paid out had acquired a title by possession of this property for nearly the time which would have operated as a bar to a claim by anybody else. Being in possession, the company negotiate with him for the purpose of taking the land; they treat him as being in possession, and he assumes himself to be a person who can make a title to the property. A contract is entered into based upon the assumption of his being the owner and capable of making a title to the fee simple. Nobody could doubt for a moment that, if this

(1) 17 Beav. 421. (2) 1 Drew. 184.
(3) 2 Dr. & Sm. 305.

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Act of Parliament had not passed, he had a most valuable right and interest which could have been sold in the market, although he had not yet the full statutory title.

The argument which has been addressed to me involves this, that because he had not, at the moment the company took possession, got a complete title by reason of the period of twenty years not having then expired, the effect of the Act of Parliament was summarily to deprive him of that which certainly was his property subject to the contingency of the real owner turning up and making a claim within half a year from the period when the company intervened and took the property. To give to the Act such an effect and operation would, to my mind, be putting a very unreasonable construction upon it. Supposing that the railway company, instead of paying the money into Court, had paid it to the claimant, there was nothing to prevent the real owner coming forward and claiming as against the company to be paid over again. There was nothing, if his contention now before me is right, to prevent him coming to the Court to claim this money within twenty years, the period when the title would have been complete. He took no such course, and he left the money where it was. The money was paid in under the contract entered into with the person in possession, without the form being gone through of ascertaining, in the manner pointed out by the Act, the price to be paid in the case of the owner being absent or not being capable of being found. It is undoubted that the company in this case might, if they had thought fit, instead of proceeding upon the contract, have had the price ascertained through the medium of surveyors to be appointed under the provisions of the Act of Parliament. They did not, however, do so, but, acting upon the contract, they paid in the money into this particular account, and it seems to me that this course was not, under the circumstances, within the Act at all, except only, possibly, to this extent, that by so paying in the money and executing the deed-poll the company might get vested in them the whole of the interest of the person with whom they had contracted; but they would acquire the interest of nobody else. And they would thereby acquire the interest of the person with whom they had contracted by virtually and substantially recognising his interest in the property.

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V.-C. H. 1877 *Ex parte* WINDER. Judgment.

The whole money, therefore, must be taken as representing that interest and nothing else, except, possibly, that if it had turned out after the transaction that there was some person interested in this property who had a charge upon it which was undisclosed, such as an outstanding right to dower, or some similar interest, the payment in might have enured for the benefit of such person; and I make that observation because that seems to have been the view taken of this section by Vice-Chancellor *Wood* in *Douglass* v. *London and North Western Railway Company* (1) (a case which has not been referred to in the argument), where the Vice-Chancellor considered at some length the effect and operation of the 76th section and of the deed-poll. That was a somewhat curious case, in which a person who had contracted to give a sixty years' title, but could only prove a possessory title for some thirty or forty years, filed a bill for specific performance of the contract (which he could not have because his contract was to give sixty years' title), or in default to compel the railway company to pay in the money under the 76th section; and it was considered that he could not have that, and the Vice-Chancellor seems to have thought that all that the company would get by paying in under that section and executing a deed-poll, would be the interest of the person with whom they contracted and nothing more. In this case I think that, although the money was irregularly paid in so far as regards the rights and interest of the rightful owner, and with reference to whom no application was made to the Court, the payment was in effect one under the Act, and in respect of the contract which had been entered into; and such being the effect of the payment, and the deed-poll having the effect of vesting the interest of the contracting party in the company, it would be a strange thing if they or anybody else could turn round and say afterwards that the contracting party was to have nothing at all. That, however, is the argument. The argument is, that inasmuch as the time had not elapsed to give a title at the moment the money was paid in, it was in substance and in fact paid in so as from that moment to belong to a person who was out of possession, and who never came forward to make any claim either in respect of the land or the money for years afterwards.

(1) 3 K. & J. 178–182.

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As I have said, the position of things is this: The title not having been asserted on the part of the rightful owner (of course this will not prejudice any claim which may be made to the land itself as against the railway company), the railway company having taken possession and put themselves into the shoes of the person with whom they had contracted, and entitled themselves by the Act as against him, they did that which otherwise they unquestionably could not have done, because they could have been stopped at once in taking possession if they had attempted to do so without going through the forms prescribed by the statute, of paying the price and giving the bond, and so on. Under these circumstances it appears to me that the money so paid must be taken to have been paid in as the price agreed upon and the purchase-money payable to the person with whom the contract was entered into; subject only to his title proving in the event to be a defective title, either by reason of his having a right to proceed against the railway company for the land itself (which right apparently is now gone) or in respect of some such outstanding interest as that which I have referred to, and which was also referred to by Vice-Chancellor *Wood* in *Douglass* v. *London and North Western Railway Company*. In that case Vice-Chancellor *Wood*, in observing upon the 79th section, says (1): "That assumes that the purchase-money has been already deposited in the bank, pursuant to the provisions of the 76th section;—that this stage has been already reached; and all that it provides is this, that where the purchase-money has been so deposited by the promoters of an undertaking,—whether by reason of their not being able to find the true owner of the lands, or by reason of the existence of some outstanding estate or interest affecting the lands in the manner I have described, and making it necessary for them to have recourse to the provisions of the 76th section,—there, until the contrary is shewn, the possession shall not be interfered with, but the person in possession shall be deemed to be the owner until the contrary is shewn, and shall continue to enjoy the income of the property." That is, having ceased to be in actual possession, he is still to be considered in possession for the purpose of the continuance of the enjoyment of the income as it was enjoyed previously to possession being handed over to the

(1) 3 K. & J. 183.

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V.-C. H. 1877 *Ex parte* WINDER. Judgment.

company. That right of enjoyment of the income is, according to the view of Vice-Chancellor *Wood*, to continue until the contrary is shewn, and in this case the contrary has never been shewn at all; certainly it has never been shewn within the time which would entitle the person so shewing a title to assert such title. Again, in an earlier part of his judgment, after construing the word "owner," the Vice-Chancellor says (1): "Now, suppose the land in the hands of such an owner to be subject to dower, or to a rent-charge by way of jointure, or to any other independent estate or interest outstanding in a third party who is under no legal or equitable obligation to concur in the sale, but which does not displace the owner's title; in such a case the Court, as in *Esdaile* v. *Stephenson* (2), would consider the objection to be one, not of conveyance, but of title, and the certificate would be against the title, because the 'owner' would have no control over the person in whom the supposed estate or interest is outstanding. To such a case, therefore, the 76th section is directly applicable."

That is the sort of case which, according to my idea, is meant to be provided for by this Act. He goes on to say: "The 'owner' contracts to sell the lands to the promoters of the undertaking, and, being seised of the lands, he was competent so to contract; but when the promoters apply to him for his title, he fails to make out a title to their satisfaction by reason of the estate or interest of the dowress, jointuress, or other third party having such outstanding estate or interest in the land as I have supposed. In such a case the 76th section comes in to their aid; the party seised is enabled to sell, the promoters of the company are empowered to deposit the purchase-money to his credit, and to the credit of the dowress, jointuress, or other third party, and by so doing they obtain a clear title in respect of all their estates and interests. The dowress, jointuress, or other party claiming an outstanding estate or interest in the land could not have prevented the sale, but their estates and interests would have been obstacles in the way of the promoters, and from those obstacles the promoters are relieved by depositing the money under the 76th section." Then, further on, the Vice-Chancellor says this: "If the object,

(1) 3 K. & J. 181. (2) 6 Madd. 366.

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therefore, of the company be only to obtain a clear title against Mr. *Wartnaby*, I have no doubt their object will be perfectly attained by depositing the purchase-money in the bank under the 76th section. But whether the Plaintiff has a right to insist on the money being so deposited, and on the company accepting that title, is a different question."

Now that case, although of course I do not refer to it all as being the case now before the Court, does contain observations which have an important bearing upon the operation and effect of the 76th section, as to what can be done under it, and what is the operation of the deed-poll which is executed under it. And as none of the machinery of the Act for ascertaining the amount either by surveyors or (if it could be done in such a state of things) by means of a jury, was resorted to in this case, it would rather seem that the effect of the deed-poll would only be to vest the actual interest of the party with whom the contract was entered into. Under these circumstances, it left the real owner, as it seems to me, at liberty to take proceedings by ejectment or action against the company for having taken his property without having gone through the forms of the Act of Parliament. It is clear that he did not adopt the transaction of paying in for his benefit within twenty years, because, if there was a person really in existence at that time who could have made a claim, no claim was made.

I cannot hold, therefore, under the circumstances, that the person who had the real title could have taken, and I cannot hold him to be the party entitled to this money or to any interest in it; and this claim being out of the way, the only other alternative is that the money belongs to the person with whom the contract was made. Therefore the result is that the money must be paid out to the two parties as arranged between them. The costs must be taxed, and as two petitions in this matter have already been dismissed without costs, and the company have had to pay their own, I think they have borne enough costs, and I shall not order them to pay any costs of this petition.

Solicitors: *Milne, Riddle, & Mellor*, agents for *Nicholls, Hinde, & Co., Altrincham; Peckham, Maitland, & Peckham; A. S. Twyford; R. F. Roberts.*

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V.-C. H.

1877

May 1.

ISAAC *v.* WALL.

[1875 I. 95.]

Devise of Freeholds, Copyholds, and Leaseholds—Trust to renew Leaseholds for Lives—Tenant for Life and Remainderman—Tenant for Life a Trustee—Purchase of Leaseholds for Lives and for Years—Purchase-money charged upon the Estates—Rights of Legal Personal Representative and Tenant in Tail.

A testator vested his freeholds, copyholds, and leaseholds for lives or years determinable upon lives, in trustees in trust for his son, who was one of the trustees, for life, with remainder to his eldest son in tail. There was a trust to renew leaseholds for lives, but not for years. The tenant for life purchased the reversion in fee of a lease for lives, part of the settled estates (his own life being one), and the fee was conveyed to himself and co-trustee upon the trusts of the will, no intention being declared that the purchase-money was to enure for the benefit of those entitled under the will:—

Held, that the estate of the tenant for life was entitled to the purchase-money, with interest from his death.

A tenant for life and sole trustee of settled estates, by will, purchased reversions in fee of leases for lives (his own life being one) and for years, parts of the settled estates, and the estates were conveyed, as to the reversion of the lease for lives, to him upon the trusts of the will; as to one of the reversions of the leases for years to him absolutely; and as to the other reversion of the leases for years to him upon the trusts of the will. He died while the leases for years would have been running out, and without having declared any intention that the purchase-moneys were to enure for the benefit of those entitled under the will. The first tenant in tail died in the tenant for life's lifetime intestate, leaving a widow, and a son heir in tail:—

Held, that as to all the reversions purchased, the estate of the tenant for life was entitled to be repaid the purchase-moneys; that as regarded the legal personal representative of the first tenant in tail, both the estates of which there had been leases for years must be treated as being subject to those leases for the benefit of his first tenant in tail's estate; that as to the estate conveyed to the tenant for life absolutely, it belonged to the legal personal representative of the first tenant in tail; and that as to the other estate conveyed to him upon the trusts of the will, she was entitled to a leasehold interest of the same extent as the term would have conferred.

Statement.

THE Plaintiffs in this case were the trustees (appointed in January, 1875) of the will of *William Wall*, and they in October, 1875, filed a bill, praying that the trusts of the will, which remained to be performed, might be carried out under the direction of the Court; and for consequential directions.

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William Wall, who died in October, 1844, by his will, dated in July, 1844, after directing that his debts, legacies, funeral and testamentary expenses, should be paid out of his personal estate, and after making pecuniary bequests and specific devises, and provision for his wife (who died in March, 1862) for her life, devised all other his real estate unto *William Ellis Wall*, his son (but hereinafter called the father), and *Edward Jones Williams*, and their heirs, to the use that they should permit his wife, and her assigns during her life, to receive out of the rents a certain annuity; and, further, that they and the survivor of them, and the heirs of such survivor, should stand seised of all his real estate and premises to the use of *William Ellis Wall* (the father), and his assigns for life, without impeachment of waste, with remainder to the use of *William Ellis Wall* (the father) and *E. J. Williams*, and their heirs, during the life of *William Ellis Wall* (the father), to preserve contingent remainders, remainder to the use of the first and other sons of *William Ellis Wall* (the father) in tail, and in default of sons to the use of his daughters, as in the will mentioned, with remainder to his own daughter and her issue in strict settlement. The testator devised and bequeathed all his copyhold and leasehold estates, whether for lives or for years determinable upon lives, to *William Ellis Wall* (the father) and *E J. Williams*, and their heirs, executors, administrators, and assigns, upon trust for the same persons and subject to the same limitations as were declared concerning his real estates, or as near thereto as the rules of law and equity would admit, and he then disposed of his furniture, and charged a sum of £18,000 on his real estate, in case his personal estate should be insufficient, in favour of his daughter and her children, and he then directed his trustees to invest his residuary personal estate in the purchase of freehold, copyhold, or leasehold hereditaments, and to settle them to the same uses, and after declaring that the provisions of his will in favour of his wife and children were to be accepted by them in lieu of the provisions made in his marriage settlement, and giving certain powers of jointuring, charging portions, and leasing, he gave directions which in the view of the Court were in effect for his trustees, out of the rents of his estates generally, to keep the buildings in good repair and to insure the same; and from time to time, when and as occasion should

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V.-C. H. 1877 ISAAC v. WALL. Statement.

require, to renew the leases for lives upon which all or any of his leasehold estates were or should be holden, and also to procure admissions to be made and taken of his copyhold estates, and in case the rents of his estates generally should not be sufficient for such purposes, he directed that his trustees should raise by mortgage or sale of his estates so much money as should be sufficient with the rents to answer such purposes. The will contained powers of sale and exchange, investment, and settlement to the same uses. By a codicil, dated in May, 1845, the testator made a different disposition in favour of his wife.

The testator left, in addition to his son *William Ellis Wall* (the father), one daughter him surviving. He died possessed of personalty and entitled to estates consisting of freehold, copyhold of inheritance and for lives, and leasehold for lives and for years. The greater portion of the leasehold was held under ecclesiastical corporations.

The debts, funeral and testamentary expenses, and the legacies, were satisfied, and the sum of £18,000 was appropriated out of the personal estate, and in 1847 and 1848 personal estate amounting to £19,650 was invested by the trustees in the purchase of hereditaments, freehold, copyhold of inheritance, and leaseholds for lives, and for years. The residue of the personalty was of large amount. The questions which now arose were in reference to the following purchases of reversions.

In December, 1858, *William Ellis Wall* (the father) and *E. J. Williams* purchased for the sum of £110, by way of enfranchisement, the reversion in fee of property (hereinafter called No. 1), which the testator held under leases, which had been granted by the Bishop of *Worcester*, by way of renewal to *William Ellis Wall* (the father) and *E. J. Williams*, their heirs and assigns, for the lives of certain persons (of whom *William Ellis Wall* (the father) was one). The conveyance was made to *William Ellis Wall* (the father) and *E. J. Williams*, and their heirs, to the uses declared in the will of *William Wall*.

The portion of the lands purchased in 1847 and 1848 with the £19,650, which was copyhold of inheritance, was in 1863 enfranchised subject to the payment of an annual rent-charge of £14. When these lands were purchased they were surrendered unto the

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use of *E. J. Williams* and his heirs, and he alone was admitted. In January, 1867, these lands (hereinafter called No. 2) were released from the rent-charge by payment of £350 (purchase-money), and £11 0*s.* 10*d.* expenses. This enfranchisement was effected compulsorily by the lord of the manor.

In 1866 *William Ellis Wall* (the father) purchased for the sum of £321, by way of enfranchisement, the reversion in fee of property (hereinafter called No. 3), part of the estate of *William Wall*, which was held under a lease granted, by way of renewal, by the Bishop of *Hereford*, to *William Ellis Wall* (the father), his heirs and assigns, for the lives of three persons (of whom *William Ellis Wall* (the father) was one), and the conveyance was unto the use of *William Ellis Wall* (the father) upon the trusts declared in the will of *William Wall*.

William Ellis Wall (the father) also, in 1866, purchased, by way of enfranchisement, for the sum of £33 2*s.*, the reversion in fee of leasehold property (hereinafter called No. 4), part of the estate of *William Wall*, held under a lease for forty-one years from the 25th of March, 1857, granted by the corporation of *Worcester* by way of renewal to *William Ellis Wall* (the father) and *E. J. Williams*, their heirs, executors, administrators, and assigns, and it was granted unto the use of *William Ellis Wall* (the father), his heirs and assigns. There was no evidence to shew that this was not a conveyance to *William Ellis Wall* (the father) for his own benefit.

In 1867 *William Ellis Wall* (the father) purchased, by way of enfranchisement, for the sum of £1720, the reversion in fee of leasehold property (hereinafter called No. 5), part of the estate of *William Wall*, held under a lease, which had been granted by the Dean and Chapter of *Hereford* unto *William Ellis Wall* (the father) and *E. J. Williams*, their executors, administrators, and assigns, for a term of twenty-one years from the 5th of May, 1859, and it was granted unto the use of *William Ellis Wall* (the father), his heirs and assigns, upon the trusts declared in the will of *William Wall*.

In 1868 *William Ellis Wall* (the father) purchased for the sum of £4140, by way of enfranchisement, the reversion in fee of copyholds (hereinafter called No. 6), part of the estate of *William Wall*, held under grants for lives in possession and reversion. The

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copyholds at the time of the enfranchisement belonged absolutely to *William Ellis Wall*, the eldest son of *William Ellis Wall* (the father), subject to the life interest of the latter.

By the desire of *William Ellis Wall* (the father) and *William Ellis Wall* (the son), this property was conveyed unto *William Ellis Wall* (the father) and his heirs, upon the trusts of the will of *William Wall*. The purchase-money was paid into the *Bank of England*. These copyholds could not by custom be entailed.

The purchase-moneys for these six estates, amounting in the aggregate to £6674 2*s*., and the sums paid for expenses, amounting in the aggregate to £276 1*s*. 1*d*., were paid by *William Ellis Wall* (the father) out of his own moneys, and no part had been paid to him or to his representatives.

William Ellis Wall (the father), who died on the 1st of May, 1874, by his will, dated the 12th of December, 1871, appointed four trustees and executors (of whom his wife, *Fanny Eliza Wall*, was one), and in exercise of the power in the will of *William Wall*, appointed to his wife during her life a rent-charge of £500 issuing out of lands devised by the will of *William Wall*, and devised all the lands and hereditaments of which he should be seised or entitled (excepting certain hereditaments, and not being the hereditaments subject to the trusts of the will of *William Wall*), to the use of his wife for life, with remainder to the use of his grandson, *William Ellis Wall*, and the heirs male of his body, with remainders over. His will contained a power to the trustees to sell or exchange the devised hereditaments of which he was owner after the death of his wife, during the minority of his grandson, with the usual provisions as to investment of the proceeds.

The widow of *William Ellis Wall* (the father) died on the 20th of April, 1875.

William Ellis Wall (the father) had two sons, *William Ellis Wall* (the son) and *Edward William Wall*.

William Ellis Wall (the son) died in July, 1871, intestate. Letters of administration of his personal estate were granted to his widow, *Sarah Wall*, a Defendant.

William Ellis Wall (the son) had two sons, of whom *William Ellis Wall* (the grandson), a Defendant, was one, an infant and tenant in tail in possession.

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In November, 1859, *Edward William Wall* was appointed a trustee, in the place of *E. J. Williams*, of the will of *William Wall*. He died in June, 1865, leaving *William Ellis Wall* (the father) the sole trustee of the will of *William Wall*.

William Ellis Wall (the father), who had paid out of his own moneys the before-mentioned aggregate sums of £6674 2*s*. and £276 1*s*. 1*d*., did not make any declaration by deed, writing, or otherwise, that he intended to give up and merge the moneys so expended for the benefit of the persons interested in remainder in the residuary estate of *William Wall;* but that, on the contrary, he expressed a desire or intention to charge the same on the estates in his favour. It was stated that the purchase of the reversions was very advantageous, and even essential for the interest of all persons concerned in the residuary estates. There was very little evidence in the case. The principal was an affidavit of a gentleman who was formerly solicitor and agent of the tenant for life.

The Defendants, the executors of *William Ellis Wall* (the father), having claimed to be paid the moneys so expended, with interest from his death, and the Defendant *William Ellis Wall* (the grandson) having claimed to be equitably entitled to the enfranchised estates free from the rent-charges, as tenant in tail, and the Defendant *Sarah Wall* having claimed to be interested in the estates No. 4 and No. 5, this suit for administration became necessary. The Defendants, the executors of *William Ellis Wall* (the father), contended that though the power in the will of *William Wall* for raising money for renewals was not applicable for raising the moneys paid for the purchase of the reversions by way of enfranchisement, yet that he was authorized to raise money for the purchase of such of the reversions as were expectant on grants or leases by ecclesiastical corporations by the 23 & 24 Vict. c. 124, ss. 35, 36, and that if he died without having properly exercised his power in that behalf, his estate ought not to be prejudiced by reason of that; and also that if the prices and expenses were not recouped, the reversions purchased ought to form part of his estate.

It was stated that the legitimacy of *William Ellis Wall's* (the son's) two sons having been disputed, an application was made to the

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Court to establish it, and on the 14th of July, 1874, a declaration was made by the Judge Ordinary to that effect. On a petition of appeal, presented on the 18th of February, 1875, the House of Lords, on the 16th of March, 1876, affirmed the decree, and dismissed the petition.

Argument.

Dickinson, Q.C., and *Langworthy*, for the Plaintiffs, the trustees of the will of *W. Wall*:—

This is a case where a tenant for life (deceased), being at the same time a trustee of the will, purchased reversions of leaseholds for lives, and for years, and enfranchised copyholds. The legal personal representative of the tenant for life claims to have the moneys which he expended paid to his personal estate. The widow of the first tenant in tail also makes a claim to some portion of the estates, and the tenant in tail contends that the estates were purchased for the benefit of those entitled under the will. The result of the evidence shews that the tenant for life, neither at the time of the purchases nor subsequently, expressed any intention either one way or the other as to his claims—whether he made them for the benefit of those in remainder or for his own benefit; whether he intended that he should be repaid, or whether he would claim the further interests which were so acquired—and therefore the trustees have been obliged to ask the Court what course they ought to pursue. The power in the will to renew does not, it is submitted, apply to leaseholds for years, but only to those for lives.

Cozens-Hardy, for the Defendant *William Ellis Wall* (the grandson), tenant in tail:—

The estate (No. 1) enfranchised by *William Ellis Wall* (the father), and conveyed to the use of himself and *E. J. Williams* upon the trusts declared in the will under which *William Ellis Wall* (the father) was tenant for life, with remainder to his son in tail, now belongs to *William Ellis Wall* (the grandson) under the limitations in the will. The property was enfranchised, and freed from any charge by the tenant for life. There was, it is submitted, a renunciation of any right which *William Ellis Wall* (the father) may have had. The purchase-money is not now a

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charge on the property. It is not a case of a tenant for life paying off a charge which was upon the estate, but it is one of a simple voluntary purchase, and there is no resulting trust for the purchaser. The presumption is that he intended to benefit the estate. Indeed the evidence shews that he, during the life of *William Ellis Wall* (the son), did not express any intention to charge any of the various sums which he had paid in respect of the enfranchisements upon the estates for his own benefit. It may be contended that as after *William Ellis Wall* (the son's) death drafts were, upon his instructions, in 1872, prepared, under the provisions of the statutes 23 & 24 Vict. c. 124, ss. 35, 36, and 23 & 24 Vict. c. 145, ss. 8, 9, there was the idea of obtaining the benefit of the expenditure for his own estate; but as in May, 1874, when he died, those drafts which had been retained by him had not been executed, there was no such intention manifested as would induce the Court to act upon it. At all events, it is submitted that there was no such intention on his part, either in 1858 or when he made the subsequent enfranchisements, to charge the several sums upon the purchased estates. It is a case of a tenant for life desiring to improve the estate for the benefit of his descendants. As to the estates No. 4 and No. 5, in which the widow of *William Ellis Wall* (the son) claims an interest, the Court will not, it is submitted, carve out imaginary new leasehold estates, and give the benefit of the rents and profits to her as his legal personal representative, but, as those estates, like the others, were purchased by *William Ellis Wall* (the father) in *William Ellis Wall* (the son's) lifetime, declare that such purchases were made subject to the devise of the real estates in the will of *William Wall*, and that they all go according to the limitations in that will, and that therefore the Defendant *William Ellis Wall* (the grandson) is now entitled as tenant in tail.

Beaumont, for the Defendant, the widow of *William Ellis Wall* (the son):—

As to the claim of the trustees of *William Ellis Wall* (the father), the administratrix of *William Ellis Wall* (the son) contests it on the same grounds as those urged on the part of *William Ellis Wall* (the grandson). As to any charge under the statute 23 & 24 Vict.

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c. 124, it could only be created by some express act and at the time of the enfranchisement. That is clear, looking at the words of sect. 35. Moreover, *William Ellis Wall* (the father) could not make any such claim or charge, for he was himself chargeable with the duty and expense of renewing the leases under the terms of the will of *W. Wall*, and also as to the duty, at all events, under the provisions of the statute 23 & 24 Vict. c. 145, s. 8. That is so even where the leases are only renewable by usage, and even in the case of a mere tenant for life: *Lord Montford* v. *Lord Cadogan* (1); *Earl of Shaftesbury* v. *Duke of Marlborough* (2). But in this case he had, under the terms of the will, the express duty as trustee to renew at his own expense as tenant for life—*i.e.*, to provide for the renewals out of the rents and profits. Though the language of the clause as to this is that it should "be lawful," that, in such a case, is an obligatory trust and not a discretionary power: *Lord Milsintown* v. *Earl of Mulgrave* (3).

It is true that here there have been no renewals, but purchases of the reversions in fee, and that might perhaps have given rise, under other circumstances, to a claim for some portion of the outlay. But a trustee who is bound to procure renewals at his own expense cannot get rid of that liability by purchasing the reversion at the expense of others. That would be to intercept the right of the *cestui que trust*. It does not at all appear that he might not have renewed.

Further, he could not, by purchasing the reversions, destroy in equity those terms of years which he held as a trustee. As to those terms of years, *William Ellis Wall* (the son) was entitled absolutely after his father's death, and they formed part of his personal estate. The administratrix does not, however, propose to carve out of the inheritance terms of years such as those which have been legally merged. Being *cestui que trust* of the leasehold interest, she claims the fee-simple as an accretion to the term in each case acquired by the trustee of such term. No doubt *William Ellis Wall* (the son) might have dealt with the property so as to obliterate any such question by adopting the purchases. But that he did not do.

(1) 19 Ves. 634. (2) 2 My. & K. 111.
(3) 3 Madd. 491; 5 Madd. 471.

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If considered apart from the statutes under which the purchases were authorized and made in each case, it would be at the option of the *cestui que trust* whether he would adopt the purchased accretion or not. And the right of adoption must belong to the person who takes the trust property, *i.e.*, in this case the terms of years which were personal estate; and if considered as purchases made under statutable authority, then the principle established with respect to purchases under the *Lands Clauses Consolidation Act* applies. In either case the administratrix takes the property which now represents her late husband's leasehold for years, as forming part of his personal estate in view of a Court of Equity.

Argument.

Byrne, for the Defendants, the legal personal representatives of *William Ellis Wall* (the father):—

As to the estate No. 1, *William Ellis Wall* (the father) was one of the lives in the lease granted to the trustees, at the time of the enfranchisement, which was voluntary. This sum was an outlay or advance by the tenant for life and trustee for the benefit of the persons interested, and it was a charge which his estate ought to be paid with interest at 4 per cent. from his death; and the same argument will apply to the purchases of the reversions of leaseholds which were conveyed to *William Ellis Wall* (the father). His estate will be entitled to be recouped those moneys. One estate was held on a lease for forty-one years. If a trustee purchases of a tenant for life the reversion of a lease which is renewable, the conveyance is not absolutely for his own benefit, but only on the election of the *cestuis que trust*.

[He referred to *Bradford* v. *Brownjohn* (1); *Randall* v. *Russell* (2); *Jones* v. *Jones* (3); *Lewin* on Trusts (4); *Lawrence* v. *Maggs* (5); *Hayward* v. *Pile* (6).]

HALL, V.C.:—

Judgment.

As to the estate purchased in 1858 (No. 1) the case seems to me to stand thus:—The tenant for life advanced the purchase-money for the enfranchisement, and the estate was conveyed to

(1) Law Rep. 3 Ch. 711, 714.
(2) 3 Mer. 190, 197.
(3) 5 Hare, 440.
(4) 6th Ed. p. 322.
(5) 1 Eden, 452.
(6) Law Rep. 5 Ch. 214.

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the purchaser of the reversion and his co-trustee upon the trusts of the settlement declared by the will. That being the position of the tenant for life, has he, in the absence of any declared intention that the purchase-money should enure for the benefit of the persons entitled in remainder under the will, given the charge up or extinguished it in any way? In the position of tenant for life he received the whole of the income, and therefore the income was charged. He was practically in receipt of the income so charged until it could be shewn that the charge was got rid of. The instructions in 1872 for the preparation of the drafts clearly negative any intention to give it up at that time. It has not been shewn that the right and interest which the tenant for life had as incumbrancer when he paid the purchase-money was ever released or extinguished. The tenant for life was one of the lives in the lease. It has not been shewn that either by custom or usage the time for renewal had arrived before he died: I must hold that the charge exists, and that the estate of the tenant for life is entitled to be paid the £110 with interest at £4 per cent. from his death. Mr. *Beaumont* contended that where there is a trust for renewal of leaseholds for years or for lives the tenant for life is under an obligation to renew; that he is bound to provide a sufficient sum for renewal when the time comes, and that that is a reason why this tenant for life's estate should not be allowed to have a charge, but I do not think that that argument ought to succeed in this case. The obligation was one which never had any operation or effect in reference to this tenant for life. Does a tenant for life pay anything except as a contribution to that which is paid in reference to his enjoyment of that which is acquired by him? Where he never enjoys anything by reason of the renewal or purchase, he never pays anything at all. He comes into possession as tenant for life, and there is a trust for renewal. When the time comes for renewal, the lease is renewed, and so much is paid. If the first tenant for life be not living at that time he gets no benefit at all by the transaction. There must be something very special in the settlement to charge the tenant for life prospectively with a sum in the nature of a payment for renewals when he may never get any benefit from them. The principle, generally, is payment and apportionment of the fine, or whatever the payment may be,

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among the parties in reference to their enjoyment of that newly acquired lease, not the enjoyment beforehand. In the case of *Bradford* v. *Brownjohn* Lord Justice *Page Wood* (1) said: "The mode in which the lessors compute the fine is this: They say what is the value of this lease as a lease for twenty years in possession? Having ascertained that they say—inasmuch as it will not fall into possession for twenty years, you cannot pay the value down as if you were going to take possession immediately; what you must pay down is a sum of money which, invested and accumulated for twenty years, will at the end of that time amount to the value of the lease in possession. Then, in considering what the remainderman ought to pay on the death of a tenant for life when the renewal has been effected by the tenant for life, first take the simple case where the tenant for life happens to die at the end of the original forty years and before the reversionary twenty years comes into possession. In that case the tenant for life has bought, solely for the benefit of those who come after him, a twenty years' lease in possession. They, finding a twenty years' lease in possession, ought to pay for it according to its value. What is that value? The amount of the sum paid down twenty years ago with compound interest. After the death of the tenant for life simple interest only is computed, the right to possession of the estate on payment of an ascertained sum having accrued at the death of the tenant for life."

According to that the remainderman there had to pay the whole, and there was no contribution by the tenant for life. But this case, there being no trust for renewal applicable to the leaseholds for years, is the simple one of payment and advance made by the tenant for life, of which the remainderman claims the benefit, and he must pay the whole amount. This disposes of the other questions raised in reference to the purchase of the reversion of No. 5, and the same principle applies to the other purchases, excepting No. 6, and as to that transaction, which took place in 1868, I think it was in the nature of a bargain between the father and the son—an arrangement between them—and the result was that the son became tenant in tail of freeholds, freed from any charge, instead of being absolute owner of copyhold. The only

(1) Law Rep. 3 Ch. 713.

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other question remaining is, whether the legal personal representative of *William Ellis Wall* (the son) is entitled to have his estate placed in the same position as to the leaseholds for years, No. 4 and No. 5, as if the enfranchisement had not taken place; as he would have been absolutely entitled to the terms of years; and it appears to me that the Court ought not to allow the tenant in tail of the freeholds and absolute owner of the leaseholds, subject to the interest of the tenant for life, to be deprived, by a voluntary act of the tenant for life, of his interest in the leaseholds by their being turned into freeholds; but that would be the effect of my decision if I excluded the title of the legal personal representative of the first tenant in tail. I am of opinion that I must treat these estates as regards the legal personal representative of the first tenant in tail as subject to leases to be carved out of them for the benefit of his estate. The cases of the two estates, No. 4 and No. 5, are distinguishable. It seems to me that the larger (No 5) having been purchased and conveyed expressly subject to the trusts of the will, the parties interested in it are those who are interested under the will, subject to this, that the tenant for life has a charge for the purchase-money; and the legal personal representative of the tenant in tail has a leasehold interest of the same extent as would have existed had the term of years continued. As regards the other estate (No. 4), it seems to me that the sound view is to hold that the title acquired must take the place of the title existing at the time when the purchase took place, and that the parties entitled are those interested in the continuance of the lease at that time; the tenant for life and the tenant in tail of the freeholds and absolute owner of the leaseholds. The result will be that *William Ellis Wall* (the father) became tenant for life of this estate (No. 4) with a right to the charge, and that subject thereto *William Ellis Wall* (the son), the tenant in tail, became the absolute owner thereof.

There must be a declaration that the estates No. 1 to No. 5 are subject to the charges; that the estate (No. 5) is to be taken as if the lease were still subsisting, and that the legal personal representative of the first tenant in tail is entitled to it for such a term of years as would be equal to the term if the reversion had not been purchased, and subject to such leasehold interest, the estate will

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go according to the limitations in the will; that there must be a conveyance of the estate (No. 4) upon payment of the charge upon it; and that the estate (No. 6) belongs to the heir-at-law of *William Ellis Wall* (the son).

The costs, charges, and expenses properly incurred of the trustees, and the costs as between solicitor and client of all other parties, must be paid out of the fund.

Solicitors: *F. J. & G. J. Braikenridge.*

ASHTON *v.* STOCK.

[1875 A. 48.]

Coal Mine—Covenant not to get Coal for Sale—Trespasser—Adverse Possession of Mines—Statute of Limitations—Accounts—Allowances.

The Plaintiffs were seised in fee of lands to which their predecessors derived title under a conveyance in the reign of Queen *Elizabeth*, wherein the grantor reserved to himself and his heirs male a rent-charge of 7*s.* 8*d.*, and which contained a proviso that the grantee and his heirs should not dig or get any coal upon the lands for sale, but only such as should be burned or employed thereon.

The Defendant, claiming title under a demise from a descendant of the same grantor, had for more than twenty years worked from mines of his own under adjacent lands, into, and had taken coals from, the mines under the Plaintiffs' lands:—

Held, first, that the proviso in the original conveyance was a covenant, and not a repugnant condition, and that it did not affect the amount of damages which the Plaintiffs were entitled to claim, as, under it, the grantee was still entitled to get all the coal for his own use, though not to sell it; secondly, that the Defendant had not acquired any title to the mine by possession under the *Statute of Limitations*, and that the Plaintiffs were entitled to an injunction with an account for six years; and thirdly, that, as the Defendant had been working under a *bonâ fide* belief as to his title, he was entitled, in taking the account, to an allowance of his expenses of severing the coal as well as bringing it to bank.

Statement.

BY indenture dated the 10th of April, in the fortieth year of the reign of Queen *Elizabeth*, Sir *Thomas Gerard* and *Thomas Gerard* his son, in consideration of £16 17*s.* 4*d.*, granted a farm and lands of about twelve acres, at *Ashton-in-Makerfield*, in the county of *Lancaster*, with its appurtenances, unto and to the use of *Bryan*

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V.-C. H. 1877 ASHTON v. STOCK. Statement.

Sixsmithe, his heirs and assigns, "yeelding and payinge therefore yeerely to the said *Thomas Gerard* and to the heirs males of the bodie of the said *Thomas* lawfully begotten, and for want of heires males of the said *Thomas* then such personne and personnes as" by a certain indenture therein mentioned appointed, "the yerely rent of seaven shillings and eightpence," and also doing suit and service in and paying reasonable fines to the court of Sir *Thomas*, and finding one sufficient footman to serve in the wars within *England* and *Scotland* at the times and in manner therein specified. And the indenture contained a power of distress in case of non-payment of rent, or non-performance of the suits and services, covenants by Sir *Thomas* and his son to suffer a recovery and levy a fine, and also a proviso in the following terms:—

"Provided allwaies and the said *Bryan Sixsmithe* covenante-ing and agreeinge for himself and his heires, executors, and assignes, and evrie of them, to and with the said Sir *Thomas Gerard* and *Thomas Gerard*, Esqre., theire heires, executors, and assignes, by theese presents, and the true intente and meaninge of theese presents is that the said *Bryan Sixsmithe*, his heires or assignes, shall not digge, delve, take, or gett any coles of or in the before-bargained premises, or any parte or parcell thereof, at any time or times hereafter to bee sould or geven, but onely such as shal bee burned and occupied or ymployed in and uppon the same tenements and premises, and not otherwise nor in any other manner."

By indenture dated the 24th of June, 1629, the said *Bryan Sixsmithe* granted the same farm with all "wages . . . mynes, quarries . . . and appurtenances" to several persons who were the then trustees of a charity known as the *Seneley Green Grammar School*, their heirs and assigns, upon trust to employ and dispose of the rents and profits for the use of the grammar school, reserving unto the said Sir *Thomas Gerard* during his life, and afterwards to him or them to whom the same for the time being should appertain, the yearly rent of 7*s.* 8*d.*, with such other suits and services as the said premises were chargeable with by reason of the above-mentioned indenture.

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The three Plaintiffs were the present trustees of the charity, and they instituted the suit with the sanction of the Charity Commissioners. By their bill they alleged that the Defendant, by means of openings from the mines in the adjacent lands, had entered the mines and strata under their lands without their license, and had gotten and carried away therefrom coal to a large extent, and had made levels in their mines, and carried away the materials, and had used such levels and the mines of the Plaintiffs for carrying coals and materials to and from the mines under the adjacent lands, and for the passage of air, and other purposes; and they prayed for an injunction to restrain the Defendant from digging or getting any coals or minerals from, and from using any passages within or under their said farm and lands; that the Defendant might be decreed to pay to them the value at the pit-bank of all coal gotten by him (including therein coal rendered unworkable in the course of such getting) under the said farm and lands, and to pay a way-leave rent in respect of all substances conveyed by him through or under the said farm and lands from or to any other mines worked by him; and for ancillary relief.

The Defendant, by his answer, alleged that he had always understood and believed that the mines and beds of coal under the Plaintiffs' farm and lands had been reserved to the late Sir *John Gerard* and his predecessors in title, and he admitted the acts of which the Plaintiffs complained, but he alleged that he was a lessee of the said mines of coal under a lease thereof made by the late Sir *John Gerard*, who at the date of such lease was the person then entitled to the rent-charge of 7*s.* 8*d.* reserved by the first indenture above mentioned; and that under such indenture no right to or interest in the mines and beds of coal under the farm and lands thereby granted passed to *Bryan Sixsmithe*, his heirs and assigns, except the limited right which was the subject of the proviso in that indenture contained, but that subject thereto the said mines and beds of coal remained vested in the *Gerard* family, and descended to the said Sir *Thomas*, as whose lessee the Defendant claimed the right to work them; and that neither the Plaintiffs nor any of their predecessors, trustees of the charity, had ever exercised such limited right. The Defendant further alleged that he commenced to work to get the coals under

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the Plaintiffs' lands twenty years and upwards before the filing of the bill, and that, though the trustees of the charity, or some of them, had been aware of his workings from their first commencement, no objection thereto was ever raised until May, 1874, a year before the filing of the bill; and he claimed the benefit of the *Statute of Limitations*.

It appeared from the evidence that the Defendant began working in the year 1847, with the knowledge of one of the former trustees, who was under the impression that the coal did not belong to the charity; but that the three present trustees being advised, in the year 1869, that the coal was theirs, a letter had been written by their authority to the Defendant, suggesting that he should take a lease from them of the mines under their farm, to which the Defendant had replied in a letter dated the 16th of November, 1869, wherein he admitted his working under their land, claimed the right to do so as lessee from Sir *John Gerard*, to whom, he asserted, the minerals in question belonged, and suggested that the trustees had better consult their deed. Nothing further was done from the date of this letter until, by the direction of the Charity Commissioners, this bill was filed.

Argument.

Dickinson, Q.C., and *G. B. Finch*, for the Plaintiffs:—

The conveyance to *Bryan Sixsmithe* must be read as if the proviso with regard to the manner in which the coals were to be gotten had not been contained in it. For that proviso is not in the nature of an exception or a reservation to the grantor, but of a condition restricting the enjoyment of the grantee, and, as such, it is repugnant to the grant of an estate in fee simple: *Sheppard's* Touchstone (1). The Plaintiffs being accordingly seised in fee simple of these mines, are entitled to restrain the Defendant from prosecuting this continuing trespass.

Then, in the next place, no such period has elapsed as to supply any presumption of grant under the Prescription Acts; and the Defendant can have acquired no rights against the Plaintiffs under the *Statute of Limitations*. A person cannot, by using or working one portion of a coal mine, acquire a right to any other portion of it, and the Defendant cannot, therefore, have acquired

(1) Vol. i. Ch. 6, p. 131.

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a title to anything more than the coal which he took away upwards of twenty years ago, or to the particular chamber from which it was taken. In *MacDonnell* v. *MacKinty* (1), it was held that the omission to work quarries for twenty years was not a discontinuance within the meaning of the *Statute of Limitations*, and also that a user and possession of part of the quarries would not justify presumption of the possession of the whole so as to oust the owner's title. *Davis* v. *Shepherd* (2) is another authority in favour of the latter proposition. There is no presumption in favour of a trespasser; and the statute will not apply unless there is both absence of possession by the person who has the right and actual possession by another: *Smith* v. *Lloyd* (3).

We admit that we cannot claim an account against the Defendant for more than six years, but, as the severing the coal was a wrongful act by a trespasser, in taking such account the Defendant should not be allowed the expense of severing the coal from the mine: *Fothergill* v. *Phillips* (4); *Morgan* v. *Powell* (5); *Llynvi Company* v. *Brogden* (6).

Cotton, Q.C., and *Bagot*, for the Defendant:—

No doubt a condition repugnant to the estate of a grantee is bad, but the proviso in the original grant here is not a condition but a covenant which might be enforced in equity in the same way as a covenant not to build, and its existence must be taken into account in considering the question of the damages, if any, to which the Plaintiffs are entitled. Although mere non-user will not affect the rights of an owner of mines, user by another will; and if the arguments of the other side hold good, and the trespasser is only in possession of what he has made a chattel of, the *Statute of Limitations* does not apply to mines at all, and there can be no such thing as adverse possession of a mine. Suppose, however, the trespasser runs galleries round the whole mine? If there is, as here, an intention to take possession of and work the whole of the coal under a particular field, working the coal must be taken as possession not only of the coal severed, but of the entirety of the

(1) 10 Ir. Law Rep. 514.
(2) Law Rep. 1 Ch. 410.
(3) 9 Ex. 562, 572.
(4) Law Rep. 6 Ch. 770.
(5) 3 Q. B. 278.
(6) Law Rep. 11 Eq. 188.

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coal, within the workings at all events; and if possession is taken in such a way as to shew claim to the whole, the statute will run as to the whole. There are very few cases on the adverse possession of mines; but in *Low Moor Company* v. *Stanley Coal Company* (1), where there was a demise of several seams of coal and a working of two seams, that working was, under the circumstances, considered possession of the whole. But if the Plaintiffs' claim is not barred by the statute, it is admitted that no account can be carried back against the Defendant for more than six years; and as he has been working under a *bonâ fide* and reasonable belief as to his title, and it is not a case of wilful trespass or of fraud, he ought to be allowed not only the expense of "haulage," or bringing the coal to the pit's mouth, but also that of "hewage," or detaching it from the solid rock, and making it a chattel; for in such a case the value is what the owner has lost, *i.e.*, the thing as it existed unhewn in the pit. Otherwise, the Plaintiff would have an undue advantage, and the Defendant would receive the punishment of a wilful trespasser. The Defendant ought therefore to pay only the value of the coal as if he had purchased the mine: *Jegon* v. *Vivian* (2); *Hilton* v. *Woods* (3); *Lynvi Company* v. *Brogden* (4); *In re United Merthyr Collieries* (5).

HALL, V.C., having called upon Mr. *Dickinson* to reply only upon the question of the allowances to be granted to the Defendant in taking the account against him,

Dickinson, in reply:—

In *Jegon* v. *Vivian* the Plaintiff, knowing and asserting his own title, lay by, and allowed the Defendant to incur an expense of which he sought to obtain the advantage; and *In re United Merthyr Collieries* was a similar case; while in *Hilton* v. *Woods*, upon notice of appeal, the Defendant submitted to be charged with the expense of severance: *Llynvi Company* v. *Brogden* (6). In this case there was no acquiescence or lying by on our part, and the delay in filing our bill led to no expense on the Defendant's part, as he

(1) 34 L. T. (N.S.) 186.
(2) Law Rep. 6 Ch. 742.
(3) Ibid. 4 Eq. 432.
(4) Law Rep. 11 Eq. 188.
(5) Ibid. 15 Eq. 46.
(6) Ibid. 11 Eq. 191.

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was working from shafts sunk on his own land. We are trustees of a charity against whom a title has been asserted for many years, who could only proceed with the sanction of the Charity Commissioners, and a considerable portion of whose coal the Defendant has got for nothing; so the account ought to be taken on the principle of *Fothergill* v. *Phillips* (1), and not of *Jegon* v. *Vivian* (2).

HALL, V.C.:— Judgment.

It appears to me that the Plaintiffs' title to relief is clearly made out to the extent of an injunction, according to the prayer of the bill. It is clear to my mind that the coal in question was the subject of conveyance by the deed of the 10th of April, in the fortieth year of the reign of Queen *Elizabeth*, and was transferred by the deed of the 24th of June, 1629, and has come from the parties who so derived title by the second deed to the Plaintiffs in this suit. The clause in question is not a reservation or exception, but a covenant that the covenantor, who is the grantee, would not work the coal "to bee sould or geven, but onely such as shal bee burned and occupied or ymployed in and uppon the same tenement and premises, and not otherwise nor in any other manner." Whether this Court would have interfered by injunction upon such a covenant or not, it is unnecessary for me to say. Of course there are authorities, and probably authorities governing this case, that if there be a covenant, the Court will, unless it is repugnant to the grant, act upon it without inquiring into the question whether the person entitled to the benefit of the covenant has been damnified or not. It would, I think, probably be very difficult in this particular case to find a proper Plaintiff to such an action as that. The covenant is with Sir *Thomas Gerard* and *Thomas Gerard*, Esq., their heirs, administrators, and assigns; and, considering that it was entered into on the 10th of April, in the fortieth year of the reign of Queen *Elizabeth*, it would probably be very difficult now to make out who are the persons entitled to the benefit of the covenant and to sue as Plaintiffs upon it. But supposing that to be a covenant, as it unquestionably is, it is not necessary for me to consider, for the purposes of this action, whether it is so repugnant to the grant itself as that this

(1) Law Rep. 6 Ch. 770. (2) Law Rep. 6 Ch. 742.

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V.-C. H. 1877 ASHTON v. STOCK. Judgment.

Court would consider it inoperative. It certainly appears to me that the existence of such a covenant as that, treating it as valid, cannot affect the measure of damage, the coal having passed to the grantee, and the grantee being entitled, notwithstanding that covenant, to get the whole of the coal, to burn it, and employ it in and upon the premises. The property being coal, if a trespasser takes away that coal, I cannot measure the damage in any other way than by the value of that coal. I cannot discount it in any way by the consideration of whether it would ever have been gotten or not for the purpose of being employed upon the tenement and premises.

That being so, the next consideration is whether there is any difficulty in the Plaintiffs' way by reason of the Defendant having been working and getting some of this coal for a period of more than twenty years. I can well understand that there might be cases in which, from the manner of working coal, a person who began to work it, and was a mere wrongdoer and trespasser, might have acquired a title to a certain seam or area of coal, and that, by the mode of driving the levels and opening a certain area of coal, there might have been possession acquired to the whole thing as a mine or as a seam of coal, and not merely to the particular quantity of coal that was actually hewn and gotten. That is not, however, this case; and it is not necessary for me to say more than that such a case may exist. All that we have in this case is, that the adjoining proprietor, while engaged in working his own coal, has gone on working into the vein, and getting out a certain quantity of his neighbour's coal. That unquestionably will not give a title under the statute, or in any way, to the wrongdoer. Then the next question being as to the time during which the account is to go, that is clearly covered by the statute; and about that there is no dispute.

The only remaining question is, upon what principle the Defendant is to be held to be liable—whether he is to be allowed, in fact, for the cost of hewing and getting the coal in addition to the cost of bringing it to the pit's mouth? That is now the whole dispute between the parties. As to that, it appears that the Defendant had agreed with the grantor, or the person who derived the title under the grantor, of this mineral property, for a tenancy

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or occupation; but the deed or agreement under which he took possession has not been put in evidence on either side; and, therefore, I cannot say whether it bears in favour of one or the other; there was, however, a possession which purported to be authorized so far as the person claiming title to the coal was concerned. Having got that title with the knowledge of one of the trustees, who were the real owners of the coal, he went on working under what I must consider was a *bonâ fide* belief at the time that he had a right and title to do it.

That being so, the matter seems to have gone on in that way for a number of years until the Plaintiffs', trustees of the charity, were advised that the coal belonged to them; and upon that the letter was written which the Defendant answered in his letter of the 16th of November, 1869. After this letter, however, nothing was done for nearly six years before this bill was filed, and the Defendant went on working. Under such circumstances, it seems to me that it would be very harsh to deprive the Defendant of the benefit of the allowance for hewing the coal. It seems to me that, if there were no authority whatever upon the subject, it would be harsh to deal with him in that way. It does not, however, depend upon whether it is harsh or not, because, having regard to what was laid down by the Lord Chancellor in *Jegon* v. *Vivian* (1), to say nothing of what was superadded to that by Vice-Chancellor *Malins* and Vice-Chancellor *Bacon* in the cases before them, I think I ought not to give the account of coal gotten in this case except in such a way as to allow the Defendant to deduct from the value of the coal at the pit's mouth the expenses of hewing and hauling, in other words, the expense of severing the coal as well as bringing it to bank.

Then there must be an inquiry; and the Defendant must pay the costs of the suit up to and including the hearing.

Solicitors: *Sharpe, Parkers, & Co.*, agents for *Ackerley & Sons, Wigan; Meynell & Pemberton.*

(1) Law Rep. 6 Ch. 742.

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V.-C. H.
1877
June 18.

DAVIES *v* JENKINS.

[1875 D. 9a.]

Joint and Several Promissory Note by Husband and Wife—Bankruptcy of Husband—Separate Estate of Wife—Trustees not made Parties.

A woman, married since the passing of the *Married Women's Property Act*, 1870, joined her husband in signing a joint and several promissory note for money lent to him. The husband became bankrupt:—

Held, that her separate estate was liable for the amount due on the note, and that it was not necessary to make any trustees for the wife parties to the action.

Statement.

THIS was an action, in which the writ was issued in November, 1875, by *H. H. Davies* against *J. H. Jenkins* and *Gwenllian Jenkins*, his wife. The statement of claim set forth that the wife was, under the will of *David David*, and otherwise, possessed of or entitled to considerable separate property, and that the Plaintiff (the stepfather of the wife) gave credit to the Defendants upon the faith of such separate property.

On the 20th day of March, 1874, the Defendants made and signed their joint and several promissory note, whereby they jointly and severally promised to pay to the Plaintiff or his wife the sum of £200 three months after date. The consideration for the said note was money lent to the Defendants by the Plaintiff. The money had not been paid. *J. H. Jenkins* had become bankrupt, and his estate had paid 6*d.* in the pound. The Plaintiff claimed to have a declaration that the separate property of the wife was liable for the amount of principal and interest due and the costs of the action, and asked for inquiries and accounts. The marriage of the Defendants took place after the passing of the *Married Women's Property Act*, 1870.

The evidence, which was conflicting, was in effect that the proposal to borrow the money came from the husband, and that he said his wife would join in signing the note; that the Plaintiff declined to lend the money unless the wife would join in signing the note; that he sent the money to his own wife, who was in *Wales*, with instructions not to part with it except upon certain conditions being complied with, and that those instructions were

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not followed, as she did part with it before the note was signed. Mrs. *Jenkins* declined at first to join in signing the note, but after the money had been received by the husband she did do so. The Plaintiff had refused to accept the composition of 6*d.* in the pound from the bankrupt's estate.

Argument.

Hadley, for the Plaintiff, submitted that the Plaintiff was entitled to judgment against the separate estate of the wife generally, and to an inquiry as to what it consisted of. At the time the note was signed there were arrears of income due to the wife. The *Married Women's Property Act*, 1870, had placed married women in a position of being able to sue and to be sued. There was no necessity now to make any trustees in such a case parties to the action. He referred to *Johnson* v. *Gallagher* (1).

A. Bailey, for the Defendant, the wife, objected to any inquiry being directed. It was unnecessary, as there had been an answer to the interrogatories, and also an affidavit by the trustees. The Plaintiff was bound to set forth the particular fund which he wished to obtain payment out of, and the trustees of it ought to have been made parties to the action, as there could be no decree against a married woman personally. There was nothing in the *Married Women's Property Act*, 1870, to prevent trustees being made parties, and if there were no trustees the husband would be a trustee for her. The wife was only in the position of a volunteer and a surety, and as such she had been discharged by the Plaintiff's refusal to take the composition of 6*d.* in the pound. There ought to be no inquiry except at the risk of the Plaintiff, who asked for judgment now in order to entitle him to all the costs. There was, looking at the circumstances, no consideration for the wife's signature to the note, the money having been paid previously. He submitted that the Court ought to discountenance the practice of getting married women to put their names to such documents, as it was done for the purpose of pressure being placed upon them for payment of their husbands' debts. He referred to the case of *Francis* v. *Wigzell* (2).

Hadley, in reply :—

Any authority to be found in Mr. *Maddox's* reports could not

(1) 3 D. F. & J. 494. (2) 1 Madd. 258.

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V.-C. H. 1877 DAVIES v. JENKINS.

apply to a case which had occurred since 1870. There could be no doubt, upon the evidence, that the money was lent to the husband and wife, and therefore the Plaintiff was entitled to judgment against the separate property generally, and to costs.

Judgment.

HALL, V.C.:—

I am of opinion that where there is a dispute as to what the separate property of a married woman consists of, the proper course is to direct an inquiry in the first instance. There is nothing in the *Married Women's Property Act*, 1870, in reference to charging separate property generally, and I think that the Plaintiff is only entitled to a judgment in the form set forth in the case of *Picard* v. *Hine* (1), *i.e.*, declare that all the property of the Defendant, the wife, vested at this present date in her or in any other person or persons in trust for her, is chargeable with the payment of the amount due for principal and interest upon the promissory note, after deducting 6*d.* in the pound from such amount, that sum having been tendered to the Plaintiff on the liquidation of the bankrupt's estate. Then let the accounts and inquiries be taken, as in the case of *Picard* v. *Hine*, *i.e.*, inquire of what the separate property consists of, and in whom it is vested, and when the amount so tendered has been certified, let it be deducted in taking such accounts. It appears to me that the wife's property is liable. She signed the note, and when she did so she knew well what she was doing. I do not think that, upon the evidence, there was any want of consideration. It was part of the original bargain for the loan that she should join in signing the note. As to the argument of Mr. *Bailey*, that the trustees ought to have been made parties, I am of opinion that it was not necessary. The form of the order in *Picard* v. *Hine* goes to the length of charging any sum vested in anybody, and there would in this case be no advantage in alleging a claim to any particular sum vested in some particular person. To do that might lead to inconvenience, and add to the costs by making such person a party in the first instance.

Solicitors: *Chester & Co.*, agents for *W. D. Williams, Aberdare; I. H. Wentmore*, agent for *Clement Waldron, Cardiff.*

(1) Law Rep. 5 Ch. 278.

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In re PARIS SKATING RINK COMPANY.

V.-C. H. 1877 June 21.

Company—Winding-up—Mandamus—Judicature Act, 1873, *ss.* 16; 24, *sub-s.* 7; 25, *sub-s.* 8; 34; 100—*Judicature Act*, 1875, *s.* 11, *sub-ss.* 1, 2—*Rules of Court*, 1875, *Order* LII., *r.* 4.

A Judge of the Chancery Division of the High Court of Justice has jurisdiction to direct the issue of a mandamus in every cause or matter pending before him.

Statement.

ON the 11th of May, 1877, Vice-Chancellor *Hall* made an order to wind up the *Paris Skating Rink Company, Limited*, upon the petition of Mr. *Powys*, a shareholder and creditor, at the same time dismissing with costs a petition to wind up the company which had been presented by a Mr. *Toynbee*. While these petitions were pending, Mr. *Powys* and three other shareholders, on the 5th of May, 1877, gave notice of motion in the winding-up against the company and its directors, that a peremptory mandamus might be awarded directed to the company and the directors, commanding them immediately to convene an ordinary meeting of the company pursuant to certain clauses in the articles of association, and that the directors might pay the costs of the motion. The motion stood over from time to time; and meanwhile the winding-up order made by the Vice-Chancellor on Mr. *Powys'* petition was discharged by the Court of Appeal on the 15th of June, upon the ground that since the presentation of that petition the debt on which it had been founded had been assigned to a Mr. *Vickers*, and that since the assignment no fresh demand had been made, nor had the petition been re-advertised, whilst the company had since the winding-up order paid into Court the amount originally claimed by Mr. *Powys*.

The motion for a mandamus now came on for hearing.

Argument.

Dickinson, Q.C., and *Decimus Sturges*, in support of the motion:—

The Chancery Division of the High Court of Justice has jurisdiction to grant a mandamus; for the entire jurisdiction of the Court of Queen's Bench was transferred to the High Court by the

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V.-C. H. 1877 *In re* PARIS SKATING RINK COMPANY. Argument.

Judicature Act of 1873, s. 16, and the exceptions in sect. 17 do not affect this transfer, while under sect. 24, sub-sect. 7, every Court may grant all remedies. The 34th section assigns to the Queen's Bench Division, "subject as aforesaid," all causes and matters civil and criminal pending in the Court of Queen's Bench at the commencement of the Act, or which, but for the Act, would have been within the exclusive cognizance of the Queen's Bench in the exercise of its original jurisdiction; but this does not deprive the other branches of the Court of the jurisdiction previously bestowed upon them. By the 11th section of the *Judicature Act* of 1875, any litigant may choose in what Division he will sue, and, by sub-sect. 1, all interlocutory and other steps and proceedings shall be taken in the Division to which the cause or matter is for the time being assigned; while by sub-sect. 2 the Court, or a Judge, may either direct a transfer to another Division of a cause or matter wrongly assigned, or may retain it, and until transfer all proceedings are to be as valid and effectual as if taken in the proper Division. This is an interlocutory proceeding within sub-sect. 1; and moreover the application is expressly authorized under the practice created by sect. 25, sub-sect. 8, of the Act of 1873, which provides that a mandamus may be granted by an interlocutory order of the Court (meaning the Court in which the cause or matter is pending) in all cases in which it shall appear to the Court just or convenient.

F. G. Bagshawe, for three of the directors.

Hastings, Q.C., and *Seward Brice*, for Lord *Monson*, one of the directors; and

W. Pearson, Q.C., and *H. B. Howard*, for the three other directors:—

The Chancery Division of the High Court has no jurisdiction to grant a mandamus, except in an action, and the issue of the prerogative writ is still, as it always was, within the exclusive jurisdiction of the Court of Queen's Bench, of which Court it was styled "the flower": *Tapping* on Mandamus (1). That the

(1) Page 5, note f.

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extension of the jurisdiction to grant a mandamus to all branches of the Court under sect. 25, sub-sect. 8, of the Act of 1873, is confined to cases in which an action is pending, is shewn by the wording of the sub-section and of the Rules of Court, 1875, Order LII., rule 4, which is founded thereon, where the terms "Plaintiff" and "Defendant" are used. In this case there is neither cause nor matter pending before the Court in which the order could be made.

Dickinson, in reply:—

Under the Act of 1873, s. 100, the term "action" includes all civil proceedings, and the term "Plaintiff" includes a petitioner.

HALL, V.C.:—

I have undoubtedly jurisdiction to direct the issue of a writ of mandamus in every cause or matter pending before me; but owing to the dismissal of Mr. *Powys'* petition by the Court of Appeal, there is no longer any matter or cause pending before me in which I can make the order. The motion has fallen to the ground. I think I ought not to hear it merely for the purpose of disposing of the costs; and I shall accordingly make no order at all upon it.

Solicitors: *John Fraser; Combe & Wainwright; Varley & Toynbee; J. & R. Gole.*

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V.-C. H.
1877
June 23.

DAY *v.* WHITTAKER.

[1876 D. 92.]

District Registry—Administration Action in—Taxation of Costs.

The Court will not, except under very special circumstances, direct the costs of an action commenced in a district registry to be taxed otherwise than by the Taxing Master in *London*.

Statement.

THIS administration action, all the proceedings in which up to further consideration had been carried on in the *Liverpool* District Registry, came on upon further consideration before the Vice-Chancellor.

The estate being insufficient to pay all the legacies given by the will of the testator, an order was made on further consideration that the amounts to be received by the several legatees should be ascertained and apportioned by the Chief Clerk, that the sums found should be paid into Court, and that the costs of all parties should be taxed by the Taxing Master in *London*.

All parties were, however, desirous that the apportionment and taxation should take place in the District Registry, but on inquiry at the Paymaster General's office they were told that he would not act upon a certificate made by a District Registrar.

Robinson, Q.C., on behalf of all parties, applied for leave to have the apportionment and taxation made in the District Registry.

Judgment.

HALL, V.C.:—

I will give leave to alter the minutes of the order by directing the amounts to be apportioned by the District Registrar instead of by the Chief Clerk, an affidavit being made, if necessary, after the District Registrar has made his report verifying the amounts, on which the Paymaster General will act. I decline, however, to make any order for the taxation of costs otherwise than before the Taxing Master in *London*, and I shall only make such an order under very special circumstances.

Solicitors: *Field, Roscoe, & Co.*

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CRACKNALL *v.* JANSON.

V.-C. H.
1877
July 14.

[1876 C. 171.]

Mortgagor, Bankruptcy of—Trustee in Liquidation—Giving up of Security and Proof of Debt by prior Mortgagee—Rights of subsequent Mortgagees—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71, *s.* 6, 16, 17, 40)—*Bankruptcy Rules*, 1870, *rr.* 99, 100, 134, 136, 272.

Proof in the liquidation of the estate of a mortgagor under the *Bankruptcy Act*, 1869, by a first mortgagee, for his whole debt, and giving up the security to the trustee, put the trustee, under the operation of the statute, in the place of the first mortgagee, and do not accelerate the rights of subsequent mortgagees.

SPECIAL CASE.

Statement.

Joseph Turnley, by a deed dated the 15th of August, 1871, conveyed freehold hereditaments situate in the parish of *Croydon, Surrey*, to *Diana Mary Hearne Pellowe*, to secure the sum of £1500 and interest. The mortgage was made subject to prior charges. *Joseph Turnley*, by another deed, dated the 22nd of February, 1872, conveyed the same freehold hereditaments (together with other hereditaments) to *Stephen Cracknall* and *Edward Cooper Willis* (the Plaintiffs) to secure the sum of £5500 and interest.

Joseph Turnley, on the 5th of March, 1874, filed his petition in the *London* Court of Bankruptcy for the liquidation of his affairs under the *Bankruptcy Act*, 1869, and resolutions for a liquidation by arrangement were subsequently passed and registered, and *J. F. Lovering* (a Defendant) was appointed trustee under the liquidation.

Diana M. H. Pellowe proved, in the liquidation, for the whole of her debt, which consisted of the mortgage debt of £1500 and interest, at the same time stating that she was willing to give up, and she did give up, her mortgage deed of the 15th of August, 1871, to the trustee in the liquidation.

The Plaintiffs did not prove for any part of their mortgage debt.

The hereditaments were sold, and it was found that the proceeds of sale were insufficient to pay off the prior charges, and the mortgage debt secured by the deed of the 15th of August, 1871, and

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V.-C. H. 1877 CRACKNALL v. JANSON. Statement.

subsequent mortgages. The trustee in liquidation claimed to have the benefit of the mortgage deed of 1871 for the general creditors of the estate in priority to the Plaintiffs' mortgage security.

By sect. 6 of the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), it is enacted that " . . . the debt of the petitioning creditor must be a liquidated sum due at law or in equity, and must not be a secured debt unless the Petitioner state in his petition that he will be ready to give up such security for the benefit of the creditors in the event of the debtor being adjudicated a bankrupt, or unless the Petitioner is willing to give an estimate of the value of his security, in which latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated, but he shall, on an application being made by the trustee within the prescribed time after the date of adjudication, give up his security to such trustee for the benefit of the creditors upon payment of such estimated value;" and sect. 17 enacts that, "on the appointment of a trustee the property (of the bankrupt) shall forthwith pass to and vest in the trustee appointed;" and by sect. 16, sub-ss. 4 and 5, it is provided that a "secured creditor" shall mean any creditor holding any mortgage, charge, or lien on the bankrupt's estate, or any part thereof, as security for a debt due to him, and that a secured creditor may, at or previously to the meeting of creditors, give up the security to the trustee, and thereupon he shall rank as a creditor in respect of the whole sum due to him. By sect. 40 of the Act it is enacted that "a creditor holding a specific security on the property of the bankrupt, or on any part thereof, may, on giving up his security, prove for his whole debt. He shall also be entitled to a dividend in respect of the balance due to him after realizing or giving credit for the value of his security in manner and at the time prescribed." The General Rules for regulating the practice and procedure of the *London* Bankruptcy Court, and which came into operation on the 1st of January, 1870, provided (rule 99) that a secured creditor, unless he shall have realized his security, shall, previously to being allowed to prove or vote, state in his proof the particulars of his security and the value at which he assesses the same, and he shall be deemed to be a creditor only in respect of the balance due to him after deducting such assessed

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value of the security, and (rule 100) any secured creditor so proving shall be bound to pay over to the trustee the amount which his security shall produce beyond the amount of such assessed value, and the trustee shall be entitled, at any time before realization of such security by the creditor, to redeem the same upon payment of such assessed value.

Statement.

The questions set forth in the case for the opinion of the Court were, whether by reason of the proof of *Diana M. H. Pellowe* the benefit of the mortgage deed of the 15th of August, 1871, passed to the trustee in the liquidation and was kept alive for the benefit of the general creditors, retaining the priority to which, but for such proof, it would have been entitled over the mortgage deed of the 22nd of February, 1872; or, whether by reason of such proof it was merged and extinguished in the equity of redemption for the benefit of the mortgagees entitled under the mortgage deed of 1872.

Argument.

Dickinson, Q.C., and *Creed*, for the Plaintiffs, after referring to the sections of the *Bankruptcy Act* and the Rules above set forth, and also to rules 134, 136, and 272, contended that there was nothing in the bankruptcy law, where a prior mortgagee had elected to prove for the whole of his debt, and had given up his mortgage deed to deprive a subsequent mortgagee of the right which he possessed, irrespective of the bankruptcy law, to have the mortgaged property discharged from the prior mortgage which had been so given up. They referred to *Toulmin* v. *Steere* (1), *Otter* v. *Lord Vaux* (2), and *Ex parte King* (3).

Rigby, for the Defendant, the trustee in the liquidation, submitted that the language of the Statute and the Rules clearly shewed that where a secured creditor gave up his security the trustee in the liquidation was entitled to hold it for the benefit of the general creditors, and that consequently what had been done by the prior mortgagee in this case had not operated for the benefit of the Plaintiffs. He referred to *Ex parte Turney* (4).

Dickinson, in reply.

(1) 3 Mer. 210.
(2) 2 K. & J. 650; 6 D. M. & G. 638.
(3) Law Rep. 20 Eq. 273.
(4) 3 M. D. & D. 576.

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V.-C. H. 1877 CRACKNALL v. JANSON. Judgment.

HALL, V.C.:—

The questions in this case have not arisen before. In disposing of them I must, in the first place, consider the principle which governs the administration of property in bankruptcy. The general rule is that the property of the bankrupt must be administered in such a manner as that, on the one hand, no particular creditor shall be benefited, and, on the other, that he shall not be prejudiced. As regards the rights of creditors, matters must, in reference to their securities, remain in *statu quo*. This is the case of subsequent mortgagees who took their security subject to prior charges. One of the prior mortgagees thought it better to prove for her mortgage debt in the bankruptcy than to realize her security. The ordinary course in bankruptcy was, until the passing of the *Bankruptcy Act*, 1869, to realize the security. Under the provisions of that Act, realization is no longer necessary, but there is to be a valuation of the security. If there had been no such valuation, the security would have been no longer available for the benefit of the secured creditor. The question is, for whose benefit would it have remained available; whether for the benefit of the subsequent incumbrancers so as to accelerate their securities, or for the general body of creditors? Suppose that under the former law an incumbrancer gave up his security, what was meant by giving up? Did he give up that which he had and held to the trustee in bankruptcy? The case of successive incumbrancers was probably not one which came within the ordinary scope of cases of this kind, and it does not appear to have ever been decided either under the former or the present law. In the statute of 1869 there are provisions which have reference to giving up securities. The first of the more important provisions on the subject is sect. 6, which relates to petitioning creditors' debts. [His Lordship read the section.] The section points to two different cases: the one contemplates the giving up of the security altogether for the benefit of the creditors; and the other the giving up of the security to the trustee for the benefit of the creditors upon payment of the estimated value. Though the words "to such trustee" do not occur in the former paragraph, yet the two paragraphs mean exactly the same thing. In this case the prior mortgagee who gave up her security is not the

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petitioning creditor, but had she been, the section points out what she would have had to state. By sub-sect. 4 of sect. 16 the mortgagee may have a value put upon his security, and he may give up all to the trustee for the benefit of the creditors and rank as a creditor for what is due to him, and by sect. 40 he may, on giving up his security, prove for the whole of his debt—giving up the security which he has got for the benefit of the creditors. If the security should realize anything, the proceeds would of course be subject to the other claims, but subject to them in due order of payment. The question then is, what is the meaning of the words in the statute, "give up the security to the trustee"? They seem to me to mean that the trustee in bankruptcy is put in the same position as the mortgagee who gives up his security, and the consequence is that there is no annihilation of the security of the prior mortgagee which can avail to accelerate or advance the securities, change the rights, or improve the positions of the subsequent mortgagees, but the whole matter remains as it was, except that the trustee stands in the place of the prior mortgagee; the first question must therefore be answered affirmatively, and the second negatively.

Solicitors: *Henry White; J. W. Sykes.*

In re POOLE'S ESTATE. THOMPSON *v.* BENNETT.

[1876 P. 215.]

Married Women's Property Act, 1870 (33 & 34 *Vict. c.* 93)—*Deceased Married Woman—Earnings—Equitable Assets.*

The separate estate of a married woman in earnings, under the *Married Women's Property Act*, 1870, becomes upon her death equitable assets and divisible amongst her creditors *pari passu*, so that her executor has no right to retain in full his own debt thereout.

THIS was a creditor's administration action.

Mrs. *Poole*, the testatrix in this case, was a married woman who had carried on the business of a milliner apart from her husband.

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V.-C. H. 1877 *In re* POOLE'S ESTATE. THOMPSON v. BENNETT. Statement.

She died in May, 1876, having by her will recited that she had acquired considerable property which, under the *Married Women's Property Act*, 1870, formed part of her separate estate, and having appointed *James Bennett* executor, and having directed him to pay and discharge all her just debts. Probate of the will was granted to the executor, limited to the administration of all such personal estate and effects of the deceased as she acquired by her earnings in the trade or business of a milliner, and all investments thereof since the 9th of August, 1870, which she had power to dispose of, and had by her will disposed of accordingly, but not otherwise.

The executor had received on account of the personal estate of the testatrix £2315, and he claimed to retain thereout £1605 in respect of a debt due to him. The estate was insufficient, and the other creditors disputed his right. The estate was under the administration of the Court, and the question of the executor's right to retain the £1605 was brought before the Court by summons.

Argument.

Hastings, Q.C., and *Broome*, for the creditors:—

An executor has a right to retain his own debt only out of legal assets.

Before the *Married Women's Property Act*, 1870, her separate property was equitable assets, and her creditors were paid out of it *pari passu* because they could only affect her property in a Court of Equity, and their debts having no existence at law, were considered equal in equity: *Silk* v. *Prime* (1); *Bruere* v. *Pemberton* (2); *Murray* v. *Barlee* (3); *Owens* v. *Dickenson* (4); *Shee* v. *French* (5); *Johnson* v. *Gallagher* (6). The only case at variance with these authorities is *Shattock* v. *Shattock* (7), where the late Master of the Rolls, in deciding that property settled to the separate use of a married woman for her life and appointed by her under a power to appoint the reversion by deed or will, is not liable after her death to the payment of her debts, says: "It follows that in the administration of the separate estate of a married woman after her decease, the debts are to be paid in order of

(1) 2 Tu. L. C. 4th Ed. pp. 111, 136.
(2) Anon. 18 Ves. 258.
(3) 3 My. & K. 209.
(4) Cr. & Ph. 48, 53.
(5) 3 Drew. 716.
(6) 3 D. F. & J. 494.
(7) Law Rep. 2 Eq. 182, 194.

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priority and not *pari passu*." This was inconsistent with the judgment of Lord Justice *Turner* in *Johnson* v. *Gallagher* (1). But *Shattock* v. *Shattock* (2) was expressly disapproved of by the Judicial Committee of the Privy Council in the *London Chartered Bank of Australia* v. *Lempriere* (3), who in so doing stated their concurrence with the view of Lord Justice *Turner*.

We then come to the Act itself, and all that it does is to enact that certain earnings and property which previously were not separate estate shall be so for the future. It does not alter the character or incidents of separate estate, nor does it give the married woman any legal right of action except in the 11th section, which gives her during her husband's life the right to maintain in her own name an action as to her separate property. The operation of that section, therefore, is confined to the coverture, and leaves untouched the nature of her assets after her death.

As was said by the Master of the Rolls in *Howard* v. *Bank of England* (4), the Act carefully distinguishes "between the right to the property itself and the remedy given for the recovery or protection of the property. . . . It gives no power to contract to a married woman which she did not possess before. It does make certain property, property to her separate use, to that extent carrying with it a power to contract in respect of that property which every married woman previously possessed in a Court of Equity, and it superadds to that certain remedies in a Court of Law which it is considered desirable to give to the married woman in respect of these small sums, but beyond that I think the Act makes no alteration in the position of the married woman." These assets are accordingly equitable assets, and the executor has no right of retainer.

Dickinson, Q.C., and *Horton Smith*, Q.C., for the Defendant *Henry Bennett*, the executor:—

The preamble of the Act shews that it was intended to amend the law of contract as well as the law of property. Then, under the Act itself, a particular kind of separate property is created by

(1) 3 D. F. & J. 494.
(2) Law Rep. 2 Eq. 182.
(3) Law Rep. 4 P. C. 572, 594.
(4) Ibid. 19 Eq. 295, 300, 301.

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V.-C. H. 1877 *In re* POOLE'S ESTATE. THOMPSON v. BENNETT. Argument.

law, and to the married woman is given the power of suing at law: *Summers* v. *City Bank* (1); while she is rendered liable to be sued at law; and it is only in sect. 10 (with regard to policies) that the Act contemplates the introduction of a trustee. The observations of Lord Justice *Mellish* in *Ex parte Holland* (2) shew that in his opinion a married woman having separate property under the Act could be made a bankrupt; and the inference from the whole Act is that it intended to create a new property of a nature differing from the separate estate known to the Court of Chancery and having legal incidents; and one of such legal incidents will be that in the hands of an executor it is legal assets. If so, he has the right of retainer.

[They also referred to *Picard* v. *Hine* (3) and *Ramsden* v. *Brearley* (4).]

Hastings, in reply:—

The test whether assets are legal or equitable is the answer to the question whether the creditor can get at them through a Court of Law or must come into Equity. At law a married woman could not, before the Act, have been sued by her creditor, and if he had any claim against her separate estate he must have come into Equity, and the only difference made by the Act is that under sect. 12 he may sue her for ante-nuptial debts. This is separate estate under the Act, with its equitable attributes coming to the executor only as separate estate, and being in his hands equitable assets. The grant of probate of the will of a married woman was always limited to her separate estate, or to that over which she had a power of disposition, and since the Act it is granted in precisely the same form. In *Ex parte Holland*, the married woman was sued in respect of a debt contracted before marriage under the express provisions of sect. 12 of the Act of 1870; and therefore the observations of Lord Justice *Mellish* are mere *obiter dicta* as to any other part of the Act, while those of Lord *Cairns*, L.C., and Lord Justice *James*, in the same case, tend the other way. Those learned Judges considered that the Act should not be strained; and, least of all,

(1) Law Rep. 9 C. P. 580.
(2) Ibid. 9 Ch. 307, 311.
(3) Law Rep. 5 Ch. 274.
(4) Ibid. 10 Q. B. 147.

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should it be strained by introducing an enactment that a married woman may be sued at law in respect of her separate estate generally, merely for the sake of conferring upon her executor what has always been considered an unrighteous privilege.

HALL, V.C.:—

In the *Married Women's Property Act*, 1870, there is no express provision as to the married woman being sued, excepting in the one particular case provided for by the 12th section as to ante-nuptial debts. Whether this be an an intentional omission or not, I think the true construction of the Act is that the remedies in other respects must be such as they were before the Act, that is, by resort to a Court of Equity. In coming to this conclusion, I put out of consideration the *Judicature Act*, which has no bearing upon the question. That being so, the separate property referred to in the Act must be taken to be separate estate to be got at in the same way as under the old law, namely, through a Court of Equity. I do not rely upon the 11th section, which gives the wife the right to maintain an action in respect of her separate property; for that section only applies as between the husband and the wife, and is only available during the lifetime of the wife. The sound construction, therefore, is, that the separate property of the wife under the Act is equitable assets distributable and to be applied, after her death, according to *Owens* v. *Dickenson* (1) and the other cases, *pari passu* amongst her creditors; the result of which is that the executor in the present case has no right of retainer.

Solicitor for Plaintiff: *John Attenborough.*
Solicitors for Defendants: *Austen, De Gex, & Harding.*

(1) Cr. & Ph. 48.

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V.-C. H. 1877 July 30.

OPPENHEIMER *v.* BRITISH AND FOREIGN EXCHANGE AND INVESTMENT BANK.

[1876 O. 31.]

Company—Winding-up Lease—Claim by Lessor—Future Rent—Companies Act, 1862, *s.* 158.

A banking company which had been registered under the *Companies Act*, 1862, obtained demises of premises from the Plaintiff, and covenanted to pay him rent at the usual periods during the terms. The shareholders passed a resolution for a voluntary winding-up of the company, though it was not insolvent. A question having arisen as to Plaintiff's claim for the future rent, he brought an action for an injunction to restrain the distribution of the assets until the liability of the company had been provided for:—

Held, that the lessor was entitled to have a sum set apart which, when invested in consols, would, with half yearly rests, be sufficient to produce the amount of the rent.

Statement.

ADJOURNED SUMMONS.

The *British and Foreign Exchange and Investment Bank* (*Englisches Bank- und Wechsler-Geschäft*), *Limited*, was registered on the 15th of January, 1872, under the *Companies Act*, 1862.

The original amount of the capital of the company was fixed by the memorandum of association at £1,000,000, divided into 200,000 shares of £5 each, but by an order made by Vice-Chancellor *Hall*, in July, 1874, the capital was "reduced" to £300,000, divided into 100,000 shares of £3 each. The Plaintiff, *Charles Oppenheimer*, demised to the company premises numbered 30 *Throgmorton Street*, by two leases, at an aggregate rent of £2325, with covenants to keep in proper repair and to pay rent for the terms of years, twenty-one and nineteen and a half, at the usual periods. There was also a covenant not to sublet without the consent of the lessor. The company, after an occupation of these premises for three or four years, removed their business to premises numbered 56 *Threadneedle Street*, and with the consent of the lessor sublet part of the premises in *Throgmorton Street*, the company agreeing to restore the premises, which had been extensively altered by the sub-lessee, to their original state, if required. In March, 1876, the shareholders passed a resolution that the company, though not insolvent, should be voluntarily wound up,

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OPPENHEIMER v. BRITISH AND FOREIGN EXCHANGE AND INVESTMENT BANK.

and the Defendants, other than the company, were appointed liquidators, and they had distributed amongst the shareholders a part of the assets of the company. A correspondence took place between the solicitors of the lessor and of the liquidators in reference to provision being made by the company for their liability to the lessor under the covenants in the leases, but as the proposition made to him was deemed to be not satisfactory, he in July, 1876, commenced this action, claiming a declaration that the liability, of the company to him under the leases and under the memorandum of agreement ought to be properly provided for before any further distribution of the property of the company amongst the shareholders, and that proper orders and directions might be given for that purpose; and asking for an injunction against all the Defendants. An injunction was moved for, but, the company undertaking to set apart a certain sum to meet their liabilities, an inquiry was directed to be made in Chambers as to what those liabilities were, and how they ought to be provided for. The Chief Clerk had certified as to the terms and conditions of and in the leases, and that the liabilities ought to be provided for by setting apart the estimated sum of £12,000 to make good any amount by which the actual rent of the premises during the terms of the leases might fall short of the amount of rent which would become payable by the company.

Statement.

The Plaintiff having applied by summons to vary the certificate, on the ground, mainly, that he was entitled to have the whole future rent provided for, and not merely an estimated probable deficiency, the summons was adjourned into Court.

Dickinson, Q.C., and *Rendall*, for the Plaintiff:—

Argument.

The certificate is objectionable because it does not provide for a sufficient indemnity. There ought to be a money provision made sufficient for the payment of all rent in future. The question arises upon the construction of sect. 158 of the *Companies Act*, 1862 (25 & 26 Vict. c. 89), which enacts that "in the event of any company being wound up under this Act all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate

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being made, so far as is possible, of the value of all such debts or claims, as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value;" and it is submitted that the Plaintiff is entitled to have an indemnity for the whole of the future rent. The case of *In re Westbourne Grove Drapery Company* (1) may be referred to, but that case is distinguishable from the present.

Argument.

Hastings, Q.C., and *Speed*, for the Defendants:—

The question is entirely one as to the construction of the 158th section. But for that section the Plaintiff would have no *locus standi*. Where all the rent due to the present time has been paid, and no suggestion is made that there has been a breach of covenant, how can it be contended that this is anything more within the meaning of the section than a contingent claim, which must be estimated? The Plaintiff, however, is attempting to have the amount of rent multiplied by the number of years yet to run, and to have that sum set apart and impounded as the estimated value; but that, it is submitted, cannot be the correct view of the law which has been settled in the cases of *In re Westbourne Grove Drapery Company; In re Gartness Iron Company* (2); *In re Telegraph Construction Company* (3); *In re Haytor Granite Company* (4); and *Yelland's Case* (5).

Judgment.

HALL, V.C.:—

The question which has arisen is a very important one no doubt, but I am more embarrassed by the expressions which are to be found in the judgments of the cases which have been referred to than by any great difficulty in this case. The 158th section of the *Companies Act*, 1862, enacts that "all claims against the company, present or future, certain or contingent . . . . shall be admissible to proof" against the company. Now, rent which will accrue under covenants which have been entered into by the company, though payable at future times, is a claim of a certain ascertained amount. The section proceeds to enact, "a just estimate being made, so far as is possible, of the value of all such

(1) 5 Ch. D. 248.
(2) Law Rep. 10 Eq. 412.
(3) Law Rep. 10 Eq. 384.
(4) Ibid. 1 Ch. 77.
(5) Law Rep. 4 Eq. 350.

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. . . . claims as may be subject to any contingency . . . . or for some other reason do not bear a certain value." It seems to me that rent is a sum which does bear a certain value, therefore the latter branch of the section is applicable only where the claim is incapable of bearing a certain value. Rent is not payable as a debt or a claim subject to a contingency; and because there is another remedy for payment, viz., by distress, its value is not made less certain. It appears to me, therefore, that the Plaintiff is entitled to claim for the full amount, and to have a sum provided to meet it, less only such a sum as, when the whole has been set apart and invested, and is yielding income, will be necessary to make up the full amount. As regards the cases which have been referred to, I find the word "contingency" occurs in several of them, and the use of it creates some difficulty; but I cannot consider that the learned Judges used that expression in the sense that a valuation or estimate must be made of the amount of the claim; taking into consideration that the whole or part of the rent may be paid by the person who is sub-lessee, and between whom and the lessor there may possibly be no privity. I cannot conceive that was meant. On the contrary, when Lord Justice *Turner*, in *In re Haytor Granite Company* (1), spoke of the liability under the covenant being estimated, and when Vice-Chancellor *James*, in *In re Telegraph Construction Company* (2), referred to the lessors having a claim which might become payable at a future day, they meant that the lessors in each case were to have a sum set apart which would completely indemnify them. That, at any rate, is the spirit of the judgment of Vice-Chancellor *James*. I therefore consider that it will not be necessary to do more than to direct that there shall be set apart such a sum, to be estimated, as will, when invested with half yearly rests at 3 per cent.—taking consols at their present price—yield such a sum as will be a complete indemnity as between the lessor and the company, by producing the amount of the annual rent. The certificate of the Chief Clerk must, therefore, be varied to that extent, and the Defendants must pay the costs of the application.

Solicitors: *Pilgrim & Phillips; Dawes & Sons.*

(1) Law Rep. 1 Ch. 77. (2) Law Rep. 10 Eq. 384.

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V.-C. H.

1877

June 7, 9.

HARRIS *v.* GAMBLE.

[1877 H. 97.]

Practice—Counter-claim—Judicature Act, 1873, *s.* 24, *sub-s.* 3—*Rules of Court*, 1875, *Orders* XIX., *r.* 3; XXII., *rr.* 5, 9; XXVII., *r.* 1.

A counter-claim must claim relief against the Plaintiff, and he must be made a party to it. The relief claimed by a counter-claim must relate to the specific subject-matter of the action.

Where a counter-claim sought indemnity:—

Held, that the indemnity must be confined to the specific property which was the subject of the action.

Shephard v. *Beane* (1) observed upon.

Statement.

THE Plaintiffs, *J. Harris*, *T. Cooper*, and *A. G. Harris*, in their statement of claim, alleged that by an agreement in writing dated the 21st of October, 1876, the Defendant *Gamble* contracted to purchase from them two farms in the county of *Southampton*, with the crops and stock thereon, for £24,000, £2400 of which was to be paid as a deposit upon the execution of the contract, whereupon *Gamble* was to be let into possession of, and to be at liberty to work the farms, and to sell the crops and stock thereon; and the purchase was to be completed on the 23rd of December, 1876. That *Gamble* paid the deposit of £2400, took possession of the farms, and accepted the title thereto, but was not ready to complete on the day fixed. That the time was extended to the 7th of March, 1877, when *Gamble* again failed to complete, and his solicitor informed the Plaintiffs, in a letter of that date, that by an indenture of assignment, dated the 30th of October, 1876, made between *Gamble* of the first part, the *Real Property Trust Company* (hereafter called the *Trust Company*) of the second part, and *James Beal* of the third part, *Gamble* had assigned to *Beal*, as trustee for the *Trust Company*, all his interest under the agreement of the 21st of October, 1876, for the purpose of securing to the *Trust Company* the sum of £2400 and interest, which they had advanced to *Gamble* in order to enable him to pay the deposit under his contract. That *Beal*, as trustee for the *Trust Company*, took posses-

(1) 2 Ch. D. 223.

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sion of the farm immediately after the assignment by *Gamble* to him, and had since then worked the farms and sold the crops, and that the *Trust Company* had received the proceeds. That the *Trust Company* and *Beal* refused to deliver up possession, and that the *Trust Company* claimed a lien on the premises for the £2400 they had advanced, and for other moneys expended. The Plaintiffs made *Gamble*, the *Trust Company*, and *Beal* Defendants to their action, and claimed specific performance, a declaration of lien in their favour for the balance of the purchase-money, a decree for payment by the Defendants or some of them, and in default a sale of the farms and payment to Plaintiffs of the proceeds; that unless the purchase-money, interest, and costs should be paid, the *Trust Company* and *Beal* should deliver up possession, paying an occupation rent; and for a receiver and damages or compensation.

Beal then delivered a pleading intituled in the original action, and also between himself as Plaintiff and the *Trust Company* as Defendants by counter-claim, and headed "Statement of defence and counter-claim," in which, after disclaiming knowledge of the transactions between the Plaintiffs and *Gamble*, and submitting to act as the Court directed, he alleged, by way of counter-claim, that he had acted as agent for the *Trust Company* in negotiating the terms of the advance of the £2400 to *Gamble*, and in reporting upon the value of the stock; that by an indenture dated the 25th of October, 1876, *Gamble*, by the direction of the *Trust Company* assigned to him (*Beal*) the benefit of the agreement of the 21st of October, 1876, upon trust to take possession of the farms, stock, and crops, and sell the same, working the farms until sale, and to hold the proceeds of any sales upon trust to pay the *Trust Company* all sums which might be advanced by them to or on account of *Gamble*, either for the deposit, or on completion of the contract, or for working the farms, with interest; and subject thereto in trust for *Gamble*; that it was a term of the advance of the £2400 to *Gamble* that *Gamble* should give bills of exchange for the amount; and that at the request of the chairman of the *Trust Company*, and in order to facilitate the discounting of such bills, though without the idea of incurring any liability to the company, he, *Beal*, had accepted two bills of exchange drawn by *Gamble*, payable at six months' date, for the aggregate amount of £2400, and

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interest at 12 per cent.; that these bills were handed to the *Trust Company*, discounted by them, and subsequently presented at *Beal's* bankers for payment, and by them, at his direction, dishonoured and referred to the *Trust Company*; and that the *Trust Company* were indebted to him for having valued the stock on the farms; and that he had also incurred costs and expenses in working and endeavouring to sell the farms. *Beal* then claimed to be indemnified by the *Trust Company* against the amount of the two bills, and all costs and expenses in respect thereof; to be paid by the *Trust Company* the amounts due to him, and all costs and expenses in the execution of the trusts of the indenture of the 25th of October, 1876; and to be indemnified by the *Trust Company* against all sums which might be recovered against him by the Plaintiffs in this action by way of occupation rent, damages, costs, or otherwise.

The Plaintiffs in the action and the Defendants the *Trust Company* now each moved under the Rules of Court, 1875, Order XXII., r. 9, and Order XXVII., r. 1, to have this counter-claim struck out or excluded.

Argument.

Hastings, Q.C., and *MacSwinney*, for the Defendants, the *Trust Company*:—

This so-called counter-claim is wrong both in form and substance. It seeks no cross-relief against the Plaintiffs, and they are in no way interested in it: *Furness* v. *Booth* (1); *Warner* v. *Twining* (2).

This action is one for specific performance, in which the Plaintiffs seek to enforce a contract between themselves and *Gamble*, and the relief sought by this pleading does not specifically relate to, nor is it sufficiently connected with, the subject-matter of the action: *Padwick* v. *Scott* (3). The Defendants the *Trust Company* having lent their money, are as much entitled to have the simple question tried as the Plaintiffs, and the settlement of that question ought not to be delayed and embarrassed by the working out of the question as to indemnity between the co-Defendants *Beal* and the company. *Vide* the observations of Lord Justice *Mellish*, in

(1) 4 Ch. D. 586. (2) 24 W. R. 536.
(3) 2 Ch. D. 736.

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Treleaven v. *Bray* (1), cited in *Padwick* v. *Scott* (2). We are entitled to have this pleading excluded or struck out, both as a claim which ought not to be disposed of by way of counter-claim under Order XXII., r. 9, and as a pleading tending to embarrass or delay the fair trial of the action under Order XXVII., r. 1.

Shephard v. *Beane* (3), which may be cited on the other side, was not a case decided upon argument, nor is it, in fact, any authority against our contention.

HALL, V.C.:—That was an irregular application for the direction of the Court, which perhaps ought not to have been entertained.

Dunning, for the Plaintiffs:—

The Plaintiffs are not named as parties to this pleading, which is solely between the Defendants *Beal* and the *Trust Company;* and to constitute a counter-claim, relief must be prayed against the Plaintiff: *Judicature Act*, 1873, sect. 24, sub-s. 3; Rules of Court, 1875, Orders XIX., rr. 2, 3; XXII., rr. 5, 9. The Defendants the *Trust Company* and *Beal* were properly made co-Defendants with *Gamble*, and relief sought against them: *Aberaman Ironworks* v. *Wickens* (4). There is no case in which, under the new practice, a Plaintiff has been made to wait for relief while questions of indemnity between co-Defendants are being worked out.

Karslake, Q.C., and *Thurstan Holland*, for the Defendant *Beal*:—

The only objection to this pleading appears to be that the word "counter-claim" is used in it; and that does not invalidate it. It is a perfectly good pleading, and the case it makes could have been well pleaded in an answer under the old practice. The Plaintiffs' own statement of claim shews the connection of *Beal's* claim with the subject-matter of the action. If the judgment is for specific performance, then, under the indenture of the 25th of October, 1876, *Beal* would be entitled to a conveyance of the property, or, if a sale is directed, to the proceeds, subject to the vendor's lien. So that the form of the decree could not be settled until the

(1) 45 L. J. (Ch.) 113.
(2) 2 Ch. D. 740.
(3) 2 Ch. D. 223.
(4) Law Rep. 4 Ch. 101.

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rights set up by the counter-claim are decided, and there is a sufficient claim against the Plaintiffs under the prayer in the counter-claim for general relief.

Hastings, in reply, for the *Trust Company*:—

The counter-claim does not pray for any conveyance to *Beal*, nor is he entitled to a conveyance as of right; his rights do not depend upon the establishment of the Plaintiffs' rights, and he could have relief against the company in an independent action without making the Plaintiffs parties.

Dunning, in reply, for the Plaintiffs.

Judgment.

HALL, V.C.:—

I think that there may be some substance in this so-called counter-claim, but that it is wrongly intituled, inasmuch as the Plaintiffs in the action have not been made parties to the counter-claim. I shall accordingly give the Defendant *Beal* leave to amend his pleading by making the Plaintiffs and *Gamble* parties to the counter-claim, by introducing into it a claim (in case of specific performance being granted) to have the conveyance made, or the proceeds of the property paid, to him, and by striking out so much of the counter-claim as does not relate to the specific property which is the subject-matter of the action. The amended counter-claim must be delivered within a week, and the Plaintiffs and the Defendants will have two weeks from the delivery of the amended counter-claim to proceed with their next step in the action. The costs of these motions will be costs in the cause.

I may add that I consider that *Shephard* v. *Beane* (1) ought not to be cited as an authority.

Solicitors: *J. & R. Gole*, agents for *Oxley & Pashley, Rotherham; Walker, Twyford, & Belward; E. A. Dow.*

(1) 2 Ch. D. 223.

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CROWE *v.* BARNICOT.

FRY, J.

[1876 C. 205.]

1877

July 10.

Pleading—Counter-claim—Specific Statement of Facts relied on—Rules of Court, 1875, *Order* XIX., *rr.* 3, 4, 10—*Forms* (*Appendix C*), *Nos.* 10, 14, 24.

A counter-claim must contain in itself a specific statement of the facts upon which reliance is placed for the relief claimed.

It is not sufficient that the facts relied upon appear in the statement of defence, even though that and the counter-claim form one continuous document.

A counter-claim defective in this respect was dismissed with costs, leave to amend being, under the circumstances of the case, refused.

Statement.

THIS was an action by lessors to recover possession of leasehold premises by reason of the breach of a covenant to repair, and for damages.

On the 5th of July, 1858, *Alice Crowe* demised the premises in question, which consisted of a dwelling-house, with a cart-house and stables, sheds, workshops, premises, and garden attached thereto, to *Thomas Johnston*, for 27¾ years from the 24th of June, 1858, less ten days. The lease contained a covenant by the lessee that he, his executors, administrators, and assigns, would at all times during the term well and sufficiently repair, uphold, amend, and keep the premises, and surrender the same in good repair and condition at the end of the term, and would not during the term assign or underlet the premises without the consent in writing of the lessor, her executors, administrators, or assigns, first obtained. There was a proviso for re-entry by the lessor in case of non-payment of the rent, or breach of any of the covenants. The reversion subject to the lease became vested in the Plaintiffs. The Defendants *Barnicot* and *Isitt* were assignees of the term. On the 9th of May, 1876, they agreed to underlet the premises to the Defendant *Timewell*, subject to their obtaining the consent of the Plaintiffs to the underlease. Before this consent had been obtained, *Timewell*, without the knowledge or authority of *Barnicot* and *Isitt*, obtained possession of the premises, pulled down the greater portion of the buildings other than the dwelling-house, and commenced erecting a skating rink on the ground.

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As soon as the Plaintiffs became aware of what *Timewell* was doing they commenced this action against him and *Barnicot* and *Isitt*, claiming possession of the demised premises, payment by *Barnicot* and *Isitt* of the arrears of rent, £3000 damages from *Barnicot* and *Isitt* for breach of the covenant to repair and uphold, and an injunction to restrain *Timewell* from doing anything or permitting anything to be done on the demised premises inconsistent with the terms of the lease until the recovery of possession by the Plaintiffs.

Soon after the action was commenced Vice-Chancellor *Malins* granted an interlocutory injunction against *Timewell*.

On the 5th of December, 1876, *Timewell* delivered a defence and counter-claim, which was headed "Statement of defence and counter-claim of the Defendant *A. T. Timewell*." It consisted of fourteen paragraphs, numbered consecutively. The first thirteen paragraphs contained a statement of the facts on which the Defendant relied by way of defence, but made no reference to a counter-claim. Among other things there was a statement that the Defendant had entered into a contract for the erection of iron buildings on the demised premises at a cost of £1500, and that he had already laid out £500 on the premises.

Paragraph 14 followed immediately after paragraph 13, without any distinction, and was in these words: "This Defendant, by way of counter-claim, claims to be paid by the Plaintiffs and the Defendants *Barnicot* and *Isitt* damages for the loss he has sustained in consequence of his expenditure aforesaid upon the said premises to the amount of £1500, and he claims interest on such sum."

The Defendants *Barnicot* and *Isitt*, on the 5th of January, 1877, delivered a reply to the counter-claim of *Timewell*, by which they, in the first place, submitted "that the claim made against them by the Defendant *Timewell* is not the proper subject of a counter-claim in this action, and that no relief against them can be adjudged to the Defendant *Timewell* on such counter-claim." They then, "subject and without prejudice to the said objection," traversed some of the facts stated in the defence and counter-claim, and in other respects they joined issue on the statement of defence and counter-claim of *Timewell*.

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This was the trial of the action.

Cookson, Q.C., and *E. J. Foster*, for the Plaintiffs.

Fischer, Q.C., and *Freeling*, for the Defendants *Barnicot* and *Isitt*.

North, Q.C., and *E. Clarke*, for the Defendant *Timewell*.

Before the conclusion of the argument the Plaintiffs' counsel expressed their willingness to waive the forfeiture (if they had a right to insist on it) and to accept a judgment that the premises should be reinstated. The counsel for *Barnicot* and *Isitt* consented to this.

Judgment.

FRY, J., accordingly gave judgment that the Defendants *Barnicot* and *Isitt* should reinstate the premises in the same condition in which they were before the acts of *Timewell*. The work to be completed within six months, and to the satisfaction of a surveyor to be agreed on by the parties, or to be named by the Court. The Defendants to pay the rent up to the present time. And as to *Timewell*, he had acted most improperly. He was a mere wrong-doer. A perpetual injunction must be granted against him. The Plaintiffs' costs of the action must be paid by the Defendants.

Argument.

North, Q.C., for *Timewell*, then opened the counter-claim against *Barnicot* and *Isitt*, abandoning it against the Plaintiffs.

[FRY, J.:—The counter-claim is against *Barnicot* and *Isitt* and the Plaintiffs jointly. If you abandon it as against the Plaintiffs, does it not follow that you abandon it against *Barnicot* and *Isitt* also ?]

Freeling, for *Barnicot* and *Isitt*, took the preliminary objection that there was no statement of facts to support the counter-claim: Rules of Court, 1875, Order XIX., r. 10; Forms (Appendix C), Nos. 10, 14. The counter-claim does not even refer to the facts which appear in the statement of defence. The counter-claim ought itself to contain a specific statement of the facts relied upon. If the Defendant does rely upon any facts, he has not stated them; if he does not rely on any facts, he is clearly out of Court.

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Argument.

North, Q.C., for *Timewell*:—

The defence and counter-claim are one document. It is sufficient to state the facts once. The words "expenditure aforesaid" in the counter-claim refer to what has been already stated in the defence. That is enough. There is no surprise upon the other side, and the object of the rules is only to prevent that. In *Holloway* v. *York* (1), the only reported case on the subject, the question was a different one. The rules have never as yet been so strictly construed. The objection ought to have been taken before. *Barnicot* and *Isitt* have replied, and in their reply they have treated the document as a counter-claim. They have taken an objection to it, but not this objection. At any rate leave should be given to amend.

Judgment.

FRY, J.:—

I am of opinion that this preliminary objection is a valid one. It is quite plain that paragraph 14 of the document refers to that which has gone before, and, if you do not read that, you do not know what paragraph 14 means. There can be no doubt that in that paragraph itself there is no specific statement of the facts upon which the Defendant relies for the relief which he claims. The rules bearing on the subject are rules 3 and 10 of Order XIX. [His Lordship read them.] The 10th rule, in my opinion, means that the Defendant must state specifically in his counter-claim, or, as the Master of the Rolls expressed it in *Holloway* v. *York*, in the body of the counter-claim, the facts upon which he relies for relief. A counter-claim is intended as a substitute for a cross-bill, and therefore the facts upon which reliance is placed should appear in the counter-claim itself. If paragraph 14 alone is looked at, it is not disputed that the facts relied upon do not appear. But it is said that the whole document is a defence and counter-claim, that it is an amalgamation of the two things, that the whole of it must be looked at together. I think that such a mode of pleading is not sanctioned by the rules, and that it would be highly inconvenient. If it were permitted, the result would be that in every case of a counter-claim the pleader

(1) 25 W. R. 627.

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would omit to state the specific facts upon which he relies by way of counter-claim, and would take his chance of picking them out of the statement of defence at the trial. I am confirmed in this view by the forms of counter-claim Nos. 10 and 14, contained in Appendix C to the Rules. The forms are not, indeed, intended to be exactly followed in all cases, but they are intended as guides. In those forms the counter-claim is separated by a marked line from the defence; the facts are stated separately, and the paragraphs are numbered differently. I am of opinion, therefore, that I cannot treat this as a proper counter-claim, and I dismiss it with costs. I cannot allow an amendment. I do not think that any amendment would be likely to result in success, and, under the circumstances, I think that the Defendant is not entitled to any indulgence.

Solicitor for Plaintiffs: *John Hopgood.*
Solicitors for Defendants: *Heather & Sons; Rooks & Co.*

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NATIONAL PROVINCIAL PLATE GLASS INSURANCE COMPANY *v.* PRUDENTIAL ASSURANCE COMPANY.

[1876 N. 66.]

Ancient Light—Alteration of Plane of Window—Alteration of Shape—Small Injury—Damages or Injunction—2 & 3 Will. 4, c. 71, s. 3.

A building containing ancient lights was pulled down and replaced by another, in which the front was set back and a dormer window converted into a skylight:—

Held, that the right to access of light was not lost.

Per Jessel, M.R. (on motion for injunction): Any substantial alteration in the plane of the windows destroys the right.

Per Fry, J.: The right remains where any portion of the light which would have passed over the servient tenement through the old windows passes also through the new windows.

Considerations on which the question of injunction or damages depends discussed.

Statement.

THE *National Provincial Plate Glass Insurance Company*, the Plaintiffs in this case, occupied and held leases for long terms of years of No. 66, *Ludgate Hill*; and the *Prudential Assurance Com-*

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pany, the Defendants, were owners of buildings to the east and to the north of the building held by the Plaintiffs. In 1870 the Plaintiffs rebuilt their premises. They set back the upper floors of the east face of their building about 5 ft. 8 in., the plane of the face of the new building being parallel to that of the old building, and the windows in the new building nearly corresponding with those in the old building. A room on the ground floor of the old building was lighted by a dormer window of three faces, light to which came from an opening or well-hole between the building of the Plaintiffs and that of the Defendants. The ground floor of the new building was the same as in the old building, but instead of the dormer window, the Plaintiffs put a skylight partially co-extensive with the old window though of a different shape; and this alteration was made in order to comply with certain provisions of the Metropolitan Building Acts.

In 1876 the Defendants began to rebuild their premises, and had partially rebuilt them, when the Plaintiffs brought this action, alleging that access of light to the windows on the east face of their building, and to the room on the ground floor was already obstructed by what had been built, and that the erection of the new building to the height proposed would be an invasion of the Plaintiffs' right to access of light, and most prejudicial to the enjoyment of their premises, and the Plaintiffs claimed an injunction and damages.

On the 23rd of June, 1876, the Plaintiffs moved before the Master of the Rolls for an injunction, which his Lordship refused to grant on an interlocutory application.

Judgment, M.R.

JESSEL, M.R., after stating what were the facts of the case upon the evidence before him, continued:—

The first point to be decided is a question of law as regards those windows, which are not in the same plane as the old windows, but are further back in a parallel plane. Are those windows protected absolutely? In my opinion they are not. So far as I am aware, there is no decision exactly on the question, and therefore I am bound to give my opinion. I do not mean to say that I should have been of the same opinion if the difference had been

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a few inches or a few minutes of a degree or perhaps a degree. I think the old maxim, *de minimis non curat lex*, would apply to these cases as to all others. But when the building is substantially a new house, placed at a very considerable distance from the old house, of a different shape, and, in my opinion, a new house substantially, I think I cannot say that the access and use of light has been enjoyed with that house, though it may have been enjoyed with an ancient house which stood in a different position. I do not forget that in the case of *Tapling* v. *Jones* (1) Lord *Westbury* read the section as if instead of the words "access of light," there was the word "windows," and as if the enactment was, "when any window of a dwelling-house shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right to such window shall be deemed absolute and indefeasible." In the present case the windows are not the same, nor is it the same dwelling-house.

I agree that if the Plaintiffs had rebuilt the house and put the windows in the same positions, it would for this purpose have been the same house. But where they have built a new house in a different position a considerable distance from the old house, and have put new windows into it, the mere fact that those windows are in a parallel plane at a greater distance, or in diagonal planes at a similar distance, does not make them the same windows within the Act. I think, therefore, that whether the Plaintiffs can or cannot now restore the house or the windows, the windows are not at present within the provisions of the Act.

I now come to consider the skylight; I am not prepared to say that the case of the skylight is by any means so clear. It is to be observed that, subject to the question of enlargement, the decision in *Tapling* v. *Jones* is not decisive on the question. The aperture by which the light is admitted through the ceiling of the rooms on the ground floor is in the same place as the old aperture, and the room is the same, so that we have for that purpose not altogether a new dwelling-house, and I am not prepared to say that if the aperture remains the same, the mere fact that the old aperture was covered by glass in a different direction ought to affect the question of access of light. If, for instance, there

(1) 11 H. L. C. 290.

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was a square aperture in the side of the room which was covered over by a projecting shield, and was a window in the sense that there were sides to the shield as well as a front, so that it was not a flat series of panes of glass but a bow, and the bow was removed and replaced by flat glass, I for one should not hold that the right to access of light through the old aperture was thereby lost. Similar considerations appear to me to apply to the case of taking away a top skylight with lights either by lateral or diagonal planes, or by a combination of the two, provided that the aperture which admitted the light remains unaltered, and the only claim is to access of light by that aperture; that, I think, may still be called the same window.

The next question is, whether the mere enlargement will be sufficient to destroy the right; but it was decided in *Chandler* v. *Thompson* (1), before *Tapling* v. *Jones* (2), that there might be an action for a nuisance by obstruction to an ancient window although the window had been enlarged. That was the decision of Mr. Justice *Le Blanc*, and though it may be considered as overrruled by *Renshaw* v. *Bean* (3), yet that again was overruled by *Tapling* v. *Jones*, in which it was held to be not necessary actually to restore the window if the old window substantially remained.

But still there remains the question whether, though you have left the room unaltered, if you alter the access of light to that room, you can say that the access of light is still enjoyed with the dwelling-house, workshop, or other building. That is a serious question, depending upon whether there has been such a substantial change in the building as will amount to an abandonment of the right. In this particular instance, so far as the evidence at present goes, it appears to me that there is no evidence of such a change. The alteration of the skylight was made, not with the intention of altering the access of light, but to comply with the regulations of the Building Acts. Therefore, as far as the evidence goes, it appears to me that there has been no alteration with any intention of abandonment of right, and I am not prepared to say that if in altering other parts of the house some of the ancient rooms with their ancient windows are kept intact, there is not an

(1) 3 Camp. 80. (2) 11 H. L. C. 290.
(3) 18 Q. B. 112.

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access of light to a building within the meaning of the 3rd section of the Act, although it may not be access of light to the whole dwelling because other parts have been altered. It seems to me, therefore, that as far as the skylight is concerned, and without pledging myself to that as the final decision, this skylight would be protected as being substantially the old aperture, and as not being a light abandoned when the house was reconstructed.

Then it may be said, why do I not grant an injunction? I have already said that I think material injury to that light has taken place, but I am not prepared to say that the carrying up of the building to a greater height at the same angle will materially interfere with it. But that is not my only reason. It must not be forgotten that there are other considerations which may weigh with the Court at the hearing. In the first place, there was an absolute power given to the Court by 21 & 22 Vict. c. 27, s. 2, in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against the commission or continuance of any wrongful act, to award damages in addition to or in substitution for such injunction. It must not be forgotten that Vice-Chancellor *Kindersley*, in *Curriers' Company* v. *Corbett* (1), in dealing with the provisions of that statute, said that the fact of the building being completed before the injunction was asked for gave rise to a question whether an injunction ought to be granted. I myself have said so in more than one case before me. That applies to the actual obstruction caused by the present building as it now stands. There is another consideration which ought to have weight, as stated by that learned Vice-Chancellor, and that is the comparative injury caused in point of value and damage to each party as regards the removing the obstruction, that is, by destroying the new building with a view to restore the enjoyment of light. It appears to me that the injury to the Defendants will be out of all comparison to the injury to the Plaintiffs as regards the obstruction to that skylight and to the room on the ground floor.

Upon these grounds, quite independently of the question of law, as at present advised, and though I think the Plaintiffs

(1) 2 Dr. & Sm. 355, 360.

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right as regards the skylight, I should hesitate long before I ordered the destruction of this new building, or its being removed for the sake of preventing injury to the Plaintiffs' light. I have not heard the case out, and I do not know of what material importance this room may be to the Plaintiffs, or to what extent any injury to their light may be remedied by artificial light or otherwise, which I shall probably learn at the hearing. But, having regard to all the circumstances, I think, the Defendants giving an undertaking to pull down anything they may build, the right thing will be to make no further order on the motion except that the costs be costs in the action.

Statement.

The action came on for trial before Mr. Justice *Fry* on the 12th of July, 1877. Witnesses were examined on both sides, and his Lordship came to the conclusion that as to the windows on the east side the Plaintiffs had not shewn that the access of light would be materially affected; and that the access of light to the ground floor would be affected only by a party-wall which, before the action was begun, had been built and raised about five feet higher than the former wall. The remaining questions were, whether the Plaintiffs' rights were lost by the alteration of the window on the ground floor from a dormer window to a skylight as above mentioned; and whether damages or an injunction should be awarded. The facts on which the last question depended are stated in the judgment.

Argument.

Bagshawe, Q.C., *A. L. Smith*, and *Cozens-Hardy*, for the Plaintiffs:—

The change of plane of the windows cannot affect the right of access to light, and the dominant tenement has a right to as much light as would pass through the projection of the old window on the plane of the new window. If it was not so, the smallest alteration in the plane of a window in rebuilding would destroy the right. The Plaintiffs have a right to as much light as passed over the old buildings of the Defendants into the old window of the Plaintiffs, and the change does not destroy that

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right: *Luttrel's Case* (1); *Gale* on Easements (2); *Baxendale* v. *McMurray* (3); *Wood* v. *Saunders* (4); *Hale* v. *Oldroyd* (5).

Cookson, Q.C., *Phear*, and *Harben*, for the Defendants:—

There is no such thing as property in light, and the Plaintiffs cannot say they have a right to certain specific rays. If so, they would have a right to preserve light passing through an internal window, but no such claim has ever been thought of. They have chosen to alter their window entirely, and have abandoned what rights they had: *Blanchard* v. *Bridges* (6). They have a right only to the light as it passed through the original aperture. No doubt the fiction of a presumed grant is done away with by the statute 2 & 3 Will. 4, c. 71, s. 3, but the same principles still apply. *Renshaw* v. *Bean* (7) was a departure from the old principle: *Jackson* v. *Duke of Newcastle* (8); *Tapling* v. *Jones* (9). The Plaintiffs have chosen to alter their window, and to make it impossible for the Court to say what is the effect of the alteration, and they must take the consequences. At all events there can be no injunction granted, and the Plaintiffs can have only damages: *Smith* v. *Smith* (10); *Staight* v. *Burn* (11); *Kelk* v. *Pearson* (12); *Isenberg* v. *East India House Estate Company* (13). The light they had before was very small, and we have taken away but a small part of that, not as in *Dyers' Company* v. *King* (14). Moreover, the wall of which they complain was built before the action was begun, and they can, therefore, have only damages at the utmost.

Bagshawe, in reply.

FRY, J., after stating the facts of the case, and that it had not been shewn that the access of light to the east windows would be affected, and that the building of a certain bow window would not affect the access of light to the ground floor, but that the raising

(1) 4 Rep. 84 b.
(2) 5th Ed. p. 330.
(3) Law Rep. 2 Ch. 790.
(4) Ibid. 10 Ch. 582.
(5) 14 M. & W. 789.
(6) 4 A. & E. 176.
(7) 18 Q. B. 112.
(8) 3 D. J. & S. 275.
(9) 11 H. L. C. 290.
(10) Law Rep. 20 Eq. 500.
(11) Ibid. 5 Ch. 163.
(12) Ibid. 6 Ch. 809.
(13) 3 D. J. & S. 263.
(14) Law Rep. 9 Eq. 438.

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of the party-wall had affected the access of light to the ground floor, continued:—

The case, therefore, resolves itself into a question as to the effect of the party-wall upon the window on the ground floor, with regard to which various points have been suggested in argument. In the first place, it is said that the change which the Plaintiffs have themselves effected in the mode of lighting their ground floor deprives them of any right under the statute. It is said that the aperture must be the same, or, to use the proposition put forward by Mr. *Cookson*, it must be the same in every respect except extension in the same plane as the original window—that concession being necessary in consequence of the decision in *Tapling* v. *Jones* (1).

Now the words of the statute which regulate this matter (2 & 3 Will. 4, c. 71, s. 3) are, "That when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible."

I understood it to have been suggested in argument that the house must be the same, but if that argument be urged, I am prepared to hold that it is not tenable, and that the house need not be identical in every respect. We are not to be involved in those delicate questions of identity of structure which puzzled the Athenians with regard to their sacred trireme, or which are said to have been raised with regard to a knife. It is enough, as it seems to me, if the house be for practical purposes the same house, and this house standing upon the old foundations is, in my opinion, the same house, if it be necessary that the house shall be the same in order to bring the case within the statute. But I am not convinced even of that. In my view, the conversion of a dwelling-house into a workshop or other building would not deprive the workshop or other building of its right to the access of light which the dwelling-house had enjoyed. However, the point does not appear to me necessary for decision in the present case.

The next question which arises on the statute is this: It is said that the access of light to the dwelling-house must be identical,

(1) 11 H. L. C. 290.

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and that the right claimed and the enjoyment which has existed must be of access of light through identical apertures. Now in its breadth that proposition is not true, because the case of *Tapling* v. *Jones* (1) has shewn that you may destroy the identical aperture by taking away the surrounding lines of that aperture and yet leave your right to light intact. Furthermore, I find nothing whatever in the statute which refers expressly to a window or aperture. I find in the statute a reference to the access of light; and in my view the access of light might be described as being the freedom with which light may pass through a certain space over the servient tenement; and it appears to me that, wherever for the statutory period a given space over the servient tenement has been used by the dominant tenement for the purpose of light passing through that space, a right arises to have that space left free so long as the light passing through it is used for or by the dominant tenement. I come to that conclusion for this reason—that you do not want a statute to give you a right of access in your own premises to light through your own aperture. The statute is wanted to assure your right in the space over the servient tenement.

But then it is said that the cases have to a large extent proceeded upon the form and size of the aperture or window; and that is perfectly true, because, of course, the opening in the dominant tenement is the limit which defines the boundaries of the space over the servient tenement. It is for that reason that in all the cases the Court has had regard to the aperture in the dominant tenement by means of which the space over the servient tenement has been useful to the dominant tenement. It is said that that conclusion is inconsistent with the definition given by Lord *Westbury* in *Tapling* v. *Jones* (2), but in my opinion that is not so; and Lord *Westbury*, in referring to a window as equivalent to an access, only means that the window in effect defines the access. And that that was the view taken by the House of Lords seems to me confirmed by a passage in the judgment of Lord *Chelmsford*, in which he says (3): "By the *Prescription Act* then, after twenty years' user of the lights, the owner of them acquires an absolute and indefeasible right, which so far restricts the adjoin-

(1) 11 H. L. C. 290. (2) 11 H. L. C. 290, 306.
(3) 11 H. L. C. 318.

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ing owner in the use of his own property that he can do nothing upon his premises which may have the effect of obstructing them. The right thus acquired must necessarily be confined to the exact dimensions of the opening through which the access of light and air has been permitted." In other words, he seems to me to say that the aperture through which the access of light has been admitted is the measure of the access which is to be enjoyed over the servient tenement.

This case seems to me to illustrate the propriety of not introducing into the construction of the statute any questions with regard to aperture, opening, or window, except so far as the statute itself introduces them. For instance, in the present case no less than three openings have been suggested as being the decisive or dominant openings to which regard must be had. In the first place, there is a suggestion, which I believe I threw out, that the interstice between the sides of the wall and the overhanging top and bottom where the dormer was situated, might itself be the opening, because I conceive there can be no doubt that by a grant of the house that space would pass, and you have therefore a confined opening from the adjoining premises into what in law is the Plaintiffs' house. The second, which is that on which the Plaintiffs mainly relied, was that the dormer window, consisting of glass arranged in three distinct planes, was itself the aperture to which regard must be had. The Master of the Rolls, in his judgment on the interlocutory application, seems to have been inclined to a third view, that the aperture to which you must have regard was the opening in the ceiling in the Plaintiffs' room through which the light found its way from the dormer into the Plaintiffs' room. But it seems to me not necessary to determine any of these questions. If that dormer window had for twenty years received light passing through a space over the Defendants' premises, any aperture which the Plaintiffs may be minded to use, and which lets in any portion of the light passing through that same space, is protected by the Act—it is the same access to the same dwelling-house. When you have those circumstances it seems to me you have all that the Act requires.

But then it is said that the case of *Blanchard* v. *Bridges* (1) is

(1) 4 A. & E. 176.

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an authority for the proposition that a change in the plane of the window puts an end to the right under the statute, although a change of the aperture by expansion in the same plane would not put an end to that right. Now, such a conclusion seems to me one to which the Courts ought not to come, if they can help it. I am at a loss to see why putting back a window which has enjoyed light for twenty years, supposing the planes of the windows to be parallel, should effect an absolute surrender of the right which but for the putting back would have existed. Such a conclusion seems to me to have no reason or common sense to support it. And if putting back in a parallel plane will not work a forfeiture of the right, why does putting back the front at an angle with the original plane do so? I confess that I see no reason for the proposition. However, it is said that *Blanchard* v. *Bridges* (1) is an authority to bind me, whether I see or do not see the reason for it. That case appears to me to have proceeded upon this: there was that which the Court held amounted to an implied grant of a right to have certain windows, and an implied license or covenant not to abstract the access of light to those windows; and the whole question was, what was the extent to which that implied grant, license, or covenant went? The facts were shortly these: The Plaintiff had been allowed to erect windows looking east in his building or cottage; he then built out a projection five feet from the original house, two bays looking north and south, and also more or less east, and the question was, whether the original grant, license, or covenant was to be deemed to protect these new windows. The Court held it was not. It was a mere question how far the implied grant, license, or covenant was to be deemed to have gone. The Court says (2) that a person might well acquiesce in the existence of a window of a given size, elevation, or position, because it was felt to be no annoyance to him, but that to hold him to be thereby concluded as to some other window to which he might have the greatest objection, and to which he would never have assented if it had come in the first instance, would be a great hardship. Therefore I do not think that case to be a binding authority for the purpose for which it has been used before me; and I hold, in the present

(1) 4 A. & E. 176. (2) 4 A. & E. 191.

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case, that there has been for twenty years an access of light to the Plaintiffs' dwelling-house through a portion of space over the Defendants' tenement, which reached the ground floor of the Plaintiffs' house, and a portion of which, if not the whole, still reaches the same tenement of the Plaintiffs through an aperture. I have said that it does not appear to me to be necessary to determine whether the aperture be or be not the same. Further than that, if I am wrong in the conclusion that the aperture need not be the same, I yet think that in this case I ought to hold that as to so much of the new aperture as does let through the old light, it ought to be deemed the same aperture.

That being so, I next come to the material question, whether the Defendants by their buildings have or have not stopped so much of the light which I have held to be privileged, as materially to affect the beneficial enjoyment of the Plaintiffs' premises, and as to entitle the Plaintiffs to a substantial or considerable sum by way of damages. The Defendants have asked my attention to several points bearing upon this question. They have said, and said truly, that the privileged light is only a portion of the light which now finds its way through the entire skylight.

[His Lordship then stated that on the evidence he had come to the conclusion that the raising of the party-wall in very close proximity to the privileged part of the skylight had diminished the very small amount of light which previously came into the room, and that considerable damages ought to be awarded in respect of that interception of the privileged light. Then came the question whether an injunction ought to be granted or damages ought to be awarded in lieu of an injunction, and in his Lordship's opinion there had been such delay on the part of the Plaintiffs in asserting their right as might not of itself be fatal to their obtaining an injunction, but must be considered. His Lordship then continued:—]

Beyond that I must consider what the Master of the Rolls has called the materiality of the injury done to the Plaintiffs. Now by that expression the Master of the Rolls, in *Smith* v. *Smith* (1), meant something more than a question of whether there was a material injury which would give him jurisdiction

(1) Law Rep. 20 Eq. 500, 505.

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to grant an injunction, because if there were not that material injury no question could arise between injunction and damages as alternatives. Having regard, then, to the materiality of the injury here, I think it is not very serious. I think that a dark room will be made a little darker, in fact so much darker that damages would have been given to the extent of £100 or £200, or possibly even more; but that the damage will not be such as to affect seriously the occupation of the Plaintiffs' house by the Plaintiffs. Further than that, I think I am at liberty to have regard to the whole scheme of the Defendants, and I find that this injury done to the Plaintiffs is done by an integral part of a very important building scheme, the other part of which will not result in damage to the Plaintiffs. I am also of opinion that a portion of the Defendants' building scheme actually enures to the benefit of the Plaintiffs, because the substitution of a building to the north-east of the Plaintiffs for the screen, which was nearer to them, actually conferred a benefit on the Plaintiffs. Now, although I am not at liberty to hold the injury compensated for by the benefit, yet in deciding the questions of damages or of injunction, I am at liberty to consider it as one element which has to influence my discretion in deciding which of the two alternatives, injunction or damages, I shall adopt.

Considering, then, as I said, the course which the Plaintiffs have pursued, and the general circumstances of the case, including the nature of the Defendants' building scheme and the materiality of the injury done to the Plaintiffs, I think myself at liberty to refuse, and I think that I shall do that which is most right between the parties by refusing a mandatory injunction and by assessing damages in lieu of it, and accordingly I assess the damages at the sum of £200.

Then arises the question with regard to costs. As a general rule, from which I believe I have as yet only departed in one case, costs should follow the event. But in this case I am not at liberty to exclude from consideration the fact that the Plaintiffs have put their case far too high. Whether they by their original claim claimed relief in respect of the structure to the north-east is not perhaps very apparent on the pleadings, but the Plaintiffs have taken that view, because they have opened that case at the

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bar. With regard to that and the bay, I think the Plaintiffs were wrong in their contention. I think that it is far from certain that if the Plaintiffs had confined their case to that which was, in my opinion, the true case in respect to which they had rights against the Defendants, the litigation might not have taken a very different turn. I think, therefore, it is a case in which the Plaintiffs themselves have put their rights so high, and failed to so large an extent, that I am justified, although giving judgment for damages in the manner I have done, to say that that judgment shall be without costs, and I do so accordingly.

Solicitors for Plaintiffs: *Townley, Gard, & Corbin.*
Solicitors for Defendants: *Barnard & Co.*

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July 23.

MOET *v.* PICKERING.

[1876 M. 295.]

Trade-mark—Infringement—Injunction—Lien for Costs—Costs of Stakeholder.

On the granting of an injunction to restrain the infringement by the principal Defendant of the Plaintiff's trade-mark:—

Held, that the Plaintiff was entitled to a lien for his costs of the action upon goods marked with the spurious mark which were in the hands of a wharfinger (a Defendant) who had received them from the principal Defendant in the ordinary course of business without knowledge of any fraud, and that this lien was superior to any lien of the wharfinger in respect of his charges, and to any rights of the trustee in bankruptcy of the principal Defendant, who had become bankrupt since the commencement of the action:

Held, also, that as the wharfinger had not unequivocally submitted to the order of the Court, but had insisted on the priority of his lien on the goods in respect of his charges, he had lost his right to be paid his costs of the action by the Plaintiff, and must, on the contrary, be made jointly liable for the Plaintiff's costs of the action.

Statement.

THIS was an action to restrain an alleged infringement of the Plaintiff's trade-mark.

By the statement of claim it appeared that the Plaintiffs, Messrs. *Moet & Chandon*, were producers and shippers of champagne at *Epernay*, in *France*. Their wine had acquired a high

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reputation, and was known in the trade and to the public as *Moet & Chandon's* champagne. They had been in the habit of placing on the bottom of each cork with which one quality of their wine was bottled a brand consisting of the letters "*M. & C.*," together with a star, all inclosed in a circular ring, and the word "*England*" was branded on the side of each cork. This brand had been used by the Plaintiffs for a quality of champagne specially prepared for the English market.

The Defendant *Joseph Pickering* had had consigned to him from his agents abroad a large quantity of champagne, not produced by the Plaintiffs, in bottles with corks branded with a brand similar to that of the Plaintiffs, and he was about to sell this wine in *England* as the Plaintiffs' wine. The wine so consigned to him was in the possession of Messrs. *Besley & Wilson*, wharfingers in *London*, who were also made Defendants to the action.

The Plaintiffs claimed an injunction to restrain *Pickering* from selling any champagne in bottles with corks bearing the Plaintiffs' brand or only colourably differing from it; an injunction to restrain *Pickering* from dealing with any of the champagne which was in the possession of *Besley & Wilson*, and to restrain *Besley & Wilson* from parting with that champagne except under the direction of the Court; an order that *Pickering* should deliver up to the Plaintiffs all corks in his possession or power branded with the Plaintiffs' brand or any imitation of it; an account of profits made by *Pickering* by the sale of wine sold by him in bottles with corks bearing the Plaintiffs' brand or any imitation of it; and the payment of damages by *Pickering*.

On the 17th of October, 1876, an interlocutory injunction was granted by Mr. Justice *Field*, as vacation Judge, restraining *Pickering*, until judgment in the action or until further order, from selling any champagne in bottles with corks bearing the Plaintiffs' brand or any imitation of it, and from dealing with or disposing of any of the champagne in the possession of *Besley & Wilson*, and to restrain *Besley & Wilson* from parting with any of that champagne.

By their statement of defence *Besley & Wilson* said that they received the champagne which was in their possession from *Picker-*

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ing in the ordinary course of business, and without any knowledge or notion that the brand on the corks was a fraudulent imitation of the Plaintiffs' brand. They submitted to act in relation to the champagne in their possession as the Court should direct, upon their charges for rent or warehousing and their costs of the action being paid or provided for.

In April, 1877, *Pickering* was adjudicated a bankrupt. His trustee in the bankruptcy was not made a party to the action.

This was the trial of the action. *Pickering* did not appear, but the service of the notice of trial upon him was proved. His trustee in the bankruptcy appeared by counsel.

Argument.

Daniel Jones, for the Plaintiffs :—

The evidence proves that we are entitled to the relief we ask.

[FRY, J.:—How can a brand which is not visible till the cork is drawn be the subject of protection as a trade-mark? The spurious brand cannot be the means of inducing any one to purchase the Defendant's wine, as the purchaser would not see it till after he had made the purchase.]

It is the common custom of the trade to place the brand on the inside of the corks. We are entitled to a lien for our costs of the action on the wine in the wharfinger's possession: *Upmann* v. *Elkan* (1).

W. W. Karslake, for the trustee in the bankruptcy :—

Such a lien can only arise by reason of the judgment. It is therefore defeated by the prior bankruptcy.

[FRY, J.:—You only take the bankrupt's interest in the wine. There was a *lis pendens* before the adjudication of bankruptcy.]

B. Eyre, for the wharfingers :—

We received the wine in the ordinary course of business without any knowledge of a fraud, and are entitled to be paid our costs of the action by the Plaintiffs. We have also a right of lien at common law upon the wine for our charges, and this lien must have precedence over any lien of the Plaintiffs for their costs.

(1) Law Rep. 12 Eq. 140; Ibid. 7 Ch. 130.

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FRY, J.

FRY, J. :—

I cannot accede to that argument. The wharfingers say that they have an interest in these goods in the shape of a lien for their charges anterior to the Plaintiffs' lien for their costs. In my opinion they have no such right. If they had unequivocally submitted themselves to the order of the Court I should have given them their costs of the action. I cannot do so now. I shall grant an injunction against *Pickering* and against the wharfingers, and shall order the wharfingers to remove the corks from the bottles. This must be done in the presence of the Plaintiffs' agent, if they desire it. I make a declaration that the Plaintiffs are entitled to a lien on the wine for their costs of the action as against both the Defendants, and I order both the Defendants to pay those costs. *Pickering* must account for profits.

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Judgment.

Solicitors for Plaintiffs: *Nicol, Son, & Jones.*
Solicitors for wharfingers: *Arkcoll, Jones, & Cockle.*

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[1876 W. 30.]

Aug. 1, 2, 3, 4, 6.

Mine—Water—Use of Property—Water discharged into neighbouring Mine—Negligence—Ordinary Course of Working—Damages—Injunction.

The owner of a mine, who by means of a pit or shaft intercepts water which previously flowed in unascertained underground channels, is not entitled by any means not in the ordinary and proper course of working his mine to cast the water thus intercepted upon the land of his neighbour, even though, if the water had not been thus intercepted, it would have flowed naturally upon that neighbour's land.

By intercepting the water the person who digs the pit or shaft makes the water his own property, and must take the burden as well as the benefit of it. And if he afterwards casts it wrongfully on his neighbour's land, he will be liable for the damage thus done to him.

Statement.

THE Plaintiffs and the Defendants were proprietors of adjoining collieries. The action was brought to restrain the Defendants from permitting water to flow through a certain borehole in their

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mine directly or indirectly into the Plaintiffs' workings, and for damages.

The Plaintiffs were the lessees of a colliery, situate in the parish of *Workington*, in *Cumberland*. The Defendants, *Henry Kenyon* and *John Campbell*, became in June, 1875, lessees from the trustees of *John Harris* of a small coalfield situate in the adjoining parish of *Brigham*, also in *Cumberland*. Both collieries were situate close to the river *Derwent*. The Defendants' was wholly to the south of that river and to the east of the Plaintiffs'. The greater part of the Plaintiffs' colliery was also to the south of the *Derwent*, but a portion of it was on the north side of that river. The same seams of coal were found in the Plaintiffs' colliery and in the Defendants' coalfield, but there was a fault, running in a direction approximately from north-west to south-east, which crossed that part of the Plaintiffs' collieries which lay to the south of the *Derwent*. There were three seams of coal existing in both collieries, called respectively the *Ten Quarters Seam*, the *Rattler Band*, and the *Main Seam*, the *Ten Quarters Seam* being the nearest to the surface. The Plaintiffs' colliery was at the dip of the Defendants'. But on the north-east side of the fault the coal measures were from forty to sixty feet lower than on the south-west side. The Plaintiffs were working the *Main Seam* (that is, the lowest of the seams) by means of a pit called the *Lowther Pit*, south of the *Derwent*, south-west of the fault, and about half a mile to the west of the boundary between the two collieries. On the north side of the *Derwent* the fault had been pierced by a driftway to the west of the Plaintiffs' colliery, and connected therewith, and through this a communication existed between the Plaintiffs' workings on the north side of the *Derwent* and the *Lowther Pit*. In the Defendants' coalfield the *Ten Quarters Seam* lay about 126 feet below the surface of the ground, and the *Rattler Band* about thirty feet below the *Ten Quarters Seam*. The *Main Seam* in the Defendants' coalfield had been worked out to the boundary thereof many years before the Defendants became lessees. The old workings had been effected by means of three shafts, called *Hardy Gate Shaft*, *Old Banks Shaft*, and *Limefitts Shaft*. *Limefitts Shaft* was near the western boundary of the Defendants' coalfield, and nearly due east of the

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Plaintiffs' *Lowther Pit*, and about half a mile distant from it. *Old Banks Shaft* and *Hardy Gate Shaft* were situate in that order to the south-east and on the rise of *Limefitts Shaft*. There was in most places a barrier between the Plaintiffs' and the Defendants' workings where they adjoined of thirty-five yards in thickness on each side, but at one point just under the *Derwent* there was no barrier on the Defendants' side. *Hardy Gate Shaft* and *Old Banks Shaft* had been disused for many years when the Defendants became lessees, but at that time *Limefitts Shaft* was used by the trustees of *John Harris* for pumping the water out of an adjacent coal mine called *Millbanks* (not comprised in the Defendants' lease). In June, 1875, the trustees of *John Harris*, having ceased to work the *Millbanks Mine*, drew the pumps from *Limefitts Shaft*. The water then gradually rose in the old workings of the *Main Seam* until it reached the height of fifteen fathoms in *Limefitts Pit*. The water forced its way through such barrier as was left under the river *Derwent*, and got into the old workings belonging to the Plaintiffs to the north of the *Derwent*, and there rose to such a height that it passed along the driftway through the fault and into the Plaintiffs' main workings, and thence found its way by natural gravitation to the *Lowther Pit*, from which point it was pumped out by the Plaintiffs' after the withdrawal of the *Limefitts* pumps. Towards the end of July the water was found to increase greatly at the *Lowther Pit*. It had previously been about 300 gallons a minute, it then rose to 500 gallons a minute, and so continued up to the 15th of December following.

In June, 1875, the Defendants commenced sinking a new shaft, called *New Banks Shaft*, between *Limefitts Shaft* and *Old Banks Shaft*, and they continued their operations until the 12th of August, 1875, when at a distance of sixteen fathoms from the surface they reached the water. On the 18th of August they abandoned the sinking of the shaft, and commenced boring a borehole. The boring was continued until the 19th of October, 1875, when a depth of about forty fathoms had been reached, and the water flowed away through the borehole. The *Main Seam* was about five fathoms lower. The borehole subsequently got stopped up, and after considerable difficulty and expense the obstruction was removed and the water was again allowed to flow down. That was

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about the end of November, 1875. On the 15th of December the Plaintiffs found a great increase in the quantity of water which they were compelled to pump at the *Lowther Pit*. It had then reached 800 gallons per minute. It so continued till January, 1876, when it again fell to 700 gallons per minute, at which amount it remained, without any material variation, down to the trial of the action.

On the 26th of January, 1876, the writ in the action was issued. A motion for an injunction was made, but the motion was ordered to stand to the trial.

The statement of claim contained the following allegations (paragraph 4):—"The said borehole or passage was not made for the purpose of getting the coals or other minerals removed in making the same, or otherwise in the ordinary course of mining, but was made with the intent and for the purpose of getting rid of the water found or arising in the said shaft of the Defendants, and their working of the *Ten Quarters Seam* and *Rattler Band*, by discharging it into the Plaintiff company's workings in the *Main Seam*, or at all events into old workings or hollows from whence it naturally, and in fact necessarily, flows into the Plaintiff company's workings, and the Defendants, by the said borehole or passage, have diverted and are discharging such water wrongfully into the Plaintiff company's workings, so causing to flow into such workings a large amount of water which would not otherwise have found or find its way thither. The Defendants, in fact, are by the means aforesaid causing an enormous quantity of foreign water to flow into the Plaintiff company's workings, and the Plaintiff company, to their great damage and loss, have been and are compelled at great expense, in order to continue their workings in the *Main Seam* and other seams at the *Lowther Pit*, to pump all such water to the surface, inasmuch as their workings would otherwise be inundated and have to be stopped." The water which flowed through the Defendants' borehole found its way, as the Plaintiffs alleged, into that part of their workings which was on the north side of the *Derwent*, and thence to the *Lowther Pit*.

The Plaintiffs claimed—(1.) Damages for the wrong complained of; (2.) An injunction to restrain the Defendants from permitting any water to flow through or by means of the borehole, or per-

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mitting the borehole to remain open, and from in any manner, through the borehole or any other channel or passage, diverting or discharging water from their shaft or mine, or causing water to flow therefrom directly or indirectly into the Plaintiffs' workings, or any workings or hollows open to or communicating directly or indirectly therewith.

Statement.

The Defendants' statement of defence contained the following allegations (paragraph 15):—"The borehole was not made with the intent and for the purpose of getting rid of the water found or arising in the Defendants' new shaft and their workings of the *Ten Quarters Seam* and *Rattler Band* by discharging it into the Plaintiffs' workings in the *Main Seam* or into old workings or hollows from whence it naturally or necessarily flowed into the Plaintiffs' workings. The borehole was made in the usual and proper manner, and in the ordinary course of good mining, for the purpose of proving the minerals in the Defendants' coalfield, so as to enable them to decide whether it was worth while to continue sinking their shaft to work the minerals or not. The Defendants have in fact already sunk their shaft through the *Ten Quarters Seam* and *Rattler Band*, and they worked the *Rattler Band* for some time by means of both the new shaft and *Limefitts Shaft*, so as to establish a communication between the two shafts, but they have lately ceased to work from the latter shaft." Paragraph 16: "The Defendants deny that they by their borehole have diverted and are discharging the water in their new shaft and workings of the *Ten Quarters Seam* and *Rattler Band* wrongfully into the Plaintiffs' workings, and so causing to flow into such workings a large amount of water which would not otherwise have found its way there, and say that if more water than usual from the Defendants' coalfield finds its way into the Plaintiffs' colliery, it does so in consequence of the drawing of the pumps at *Limefitts*, and by percolating through the measures naturally, and owing to the law of gravitation, in consequence of the Plaintiffs' colliery being at the dip of the Defendants' coalfield, and not through any malice, wrongful act, or negligence of the Defendants, and that such water would have found its way by percolating through the measures, even if the Defendants had not sunk their new shaft or made their borehole at all."

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The Defendants also denied that there had been any perceptible increase of water in the Plaintiffs' collieries since the borehole had been made.

In an answer put in by the Plaintiffs to some interrogatories delivered by the Defendants, they said that since and by means of the opening of the Defendants' borehole the quantity of water which they had been compelled to pump by their engine at the *Lowther Pit* had been increased by an amount of about 200 gallons per minute.

Statement.

This was the trial of the action.

Argument.

North, Q.C., and *Ingle Joyce*, for the Plaintiffs:—

On the evidence it is clear that the Defendants made the borehole, not in the ordinary and proper course of working their mine, but only for the purpose of getting rid of the water. They are not entitled, therefore, to throw it upon our mine. They have no right to be active agents in sending water from their mine into ours: *Baird* v. *Williamson* (1). In that case Chief Justice *Erle* said, "The law does not authorize the occupier of the higher mine to interfere with the gravitation of the water, so as to make it more injurious to the lower mine or advantageous to himself." *Smith* v. *Kenrick* (2), *Acton* v. *Blundell* (3), and *Rylands* v. *Fletcher* (4), illustrate the same principle. The evidence shews that the water from the borehole has substantially increased the costs of the Plaintiffs' pumping.

Ince, Q.C., *Cookson*, Q.C., and *Plummer*, for the Defendants:—

The borehole was made in the ordinary and proper course of working, and therefore *Smith* v. *Kenrick* is an authority in our favour. And in *Smith* v. *Fletcher* (5) the Court held that there was a material distinction between water which came to the Plaintiffs from a natural overflow of a stream and that which came by reason of a diversion of the stream which the Defendants had made. In *Wilson* v. *Waddell* (6) it was held that an injury arising entirely from gravitation and percolation was not a valid

(1) 15 C. B. (N.S.) 376.
(2) 7 C. B. 515.
(3) 12 M. & W. 324.
(4) Law Rep. 3 H. L. 330.
(5) Ibid. 9 Ex. 64.
(6) 2 App. Cas. 95.

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ground for claiming damages. *Rex* v. *Commissioners of Sewers for Pagham* (1) is also in our favour, and so is *Crompton* v. *Lea* (2). We are entitled to credit for so much of the water flowing through the borehole as would have found its way naturally to the Plaintiffs' mine if the borehole had not existed.

[FRY, J., referred to *Chasemore* v. *Richards* (3).]

This will practically reduce the damages to nothing.

Judgment.

FRY, J., after stating the facts and the issues raised in the pleadings, continued:—

The Defendants in effect say that they bored for legitimate mining purposes, and not solely or exclusively for the purpose of getting rid of their water. That is the issue of fact which I have to try, and it appears to me upon the whole to be reasonably clear that the boring was, at any rate after the Defendants had passed through the *Rattler Band*, exclusively for the purpose of getting rid of their water. [His Lordship reviewed the evidence on this point, and continued:—]

I therefore, upon the evidence, come to the conclusion that the borehole, at any rate below the *Rattler Band*, was not made for a legitimate mining purpose, that is, it was not made in the ordinary, proper, and reasonable mode of working the Defendants' mine.

It is then said by way of defence that if there were an injury there was nevertheless no damage, and the mode in which that argument has been presented is twofold. In the first place it is said that the water, or at any rate a large part of the water which was collected by the sinking of the *New Banks Pit* would have found its way into the *Old Banks Pit*, which lies to the dip of the *New Banks Pit*; that the *Old Banks Pit* communicates with the old hollows in the main seam below; that the water would have originally flowed to *Limefitts Shaft* and have been pumped out there, but that when the *Limefitts* pumps were withdrawn, it would have flowed through the barrier into the Plaintiffs' workings to the north of the *Derwent*, and thence through the old piercing of the fault to *Lowther Pit*, and would there have been pumped out. I think

(1) 8 B. & C. 355. (2) Law Rep. 19 Eq. 115.
(3) 7 H. L. C. 349.

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Judgment.

that the evidence renders that contention, at any rate as regards a large part of the water collected in the *New Banks Pit*, highly probable, and the question therefore arises whether that is or is not an excuse of which the Defendants can avail themselves.

The question arises in this way. A man by sinking a pit intercepts underground water, not flowing in any well ascertained or known course, and throws that water upon his neighbour's land. He then says, That water, or a portion of it, would have flowed upon you if I had not intercepted it, and you cannot charge me with the damage done by the water so flowing on to your land because I have done you no harm; the terminus at which the water arrives is merely that at which it would have arrived independently of what I have done. I am of opinion that that argument ought not to prevail. The difference between water flowing in a well-known and ascertained channel upon the surface or underground, and water which finds its way through channels not well known and ascertained, is well understood and established, and it may be observed that the distinction does not depend upon the incapacity of the Courts to find the direction which the water would take in these unascertained channels, because in the case of *Acton* v. *Blundell* (1) (which is perhaps the leading authority on this branch of the law) the course of the underground channels was ascertained to this extent, that it was found as a fact that the consequence of sinking the pit by the Defendant was to withdraw the water from the Plaintiff's well; in other words, it was ascertained that the water which would have flowed to the well was intercepted by the pit. Water flowing in a well-established channel is, as we all know, not the subject of property. It is the subject only of usufruct. Standing water, on the other hand, is the subject of property. Now, he who sinks a well, or a shaft, or a pit on his own land is entitled to collect into that pit from all the pores of the land, from the small runlets and channels with which the soil is interspersed, such water as will naturally flow to that pit. That water he may make his own. It is immaterial whence it flows. A person who is injured by the sinking of the pit, though he can shew that injury has resulted to him, has no right of action against the person who has sunk the

(1) 12 M. & W. 324.

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pit. The water which before ran in unknown channels has now been collected into an ascertained reservoir or receptacle, and has become the property of him who has so collected it. By making it his property, the person who sinks the pit, in my opinion, takes with it and incurs all the liability which attaches to that property, and he cannot, after having so appropriated the water, cast it upon his neighbour and excuse himself by saying, It would have flowed to you if I had not appropriated it. The time of his appropriation of the water is the time at which we are to look with regard to the measure of his liability. He cannot appropriate it for the purpose of benefit, and not for the purpose of liability. If he takes the benefit of the water by accumulating it in his pit, he takes also the liability, and he is bound to protect his neighbour from the injury which that water may cause him. He takes it alike for benefit and for burden, for better and for worse. He cannot appropriate it for the purpose of benefit to himself, and then ask the Court to expropriate it for the purpose of relieving him from the liability which would otherwise rest upon him. That seems to me to be the fair conclusion of law when it is once admitted that the Court will not regard the underground courses through which water flows, unless they are well ascertained and known. I hold, therefore, that the Defendants, having made the water their own by collecting it in their pit, are just as much responsible for it as if it had come from any other source than that from which it is suggested that it did come, and that they cannot relieve themselves from liability by shewing that the water, if it had not been so collected, would nevertheless have found its way to the Plaintiffs' workings.

The next point is this. It is said in effect that no portion of the water which comes to the *Lowther Pit* is to be attributed to the borehole. [His Lordship reviewed the evidence and the argument on this point, and continued:—] I think that a substantial part of the increment of the water which is pumped at *Lowther Pit*—at least a tenth part of it—must be taken to have its source in the *New Banks Shaft* of the Defendants, and to have been cast by them upon the Plaintiffs' mine. What is the exact amount of the damage caused by this contribution of water from the Defendants' pit I am not asked now to ascertain, but I have come to the con-

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clusion that substantial damage has been caused to the Plaintiffs by that water. The evidence before me is not very definite or clear; but one of the witnesses considered that, even if the contribution from the borehole was taken as only forty-five gallons per minute, the additional pumping would cost the Plaintiffs upwards of £100 a year.

Now, considering that the Plaintiffs have a term of something like seventeen years to run in their mine, I cannot say that an extra expenditure of £100 a year is by any means an unsubstantial sum. I come, therefore, to the conclusion that damage has been caused to the Plaintiffs by the wrongful act of the Defendants, and I hold that there is both *damnum* and *injuria*.

It follows from this that an injunction must be granted as well as damages assessed; and the judgment which I propose to give will be in these terms: I propose to restrain the Defendants from permitting the borehole to remain open, and from causing or permitting any water to flow through or by means of the borehole or through or by means of any other channel or passage, not being a channel or passage made in the ordinary, reasonable, and proper course of mining, from the shaft or mine of the Defendants into the workings of the Plaintiffs, or into any water communicating therewith. I then propose to declare that the difference between the actual cost of pumping at the *Lowther Pit* from the 19th of October, 1875, to the time of the borehole being actually stopped, and the sum which would have been the cost of pumping during the same period if the *New Banks Pit* had been sunk down to the *Rattler Band*, and if no borehole had been carried below that seam, is the true measure of damages. Then to refer it to the Chief Clerk to assess the damages; and of course I must give the Plaintiffs the costs of the action, including the costs of the motion for an injunction.

Solicitors for Plaintiffs: *Bischoff, Bompas, & Bischoff*, agents for *E. & E. L. Waugh, Cockermouth.*

Solicitors for Defendants: *Speechly, Mumford, & Co.*, agents for *Hayton & Simpson, Cockermouth.*

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Ex parte BARROW. *In re* WORSDELL.

C. J. B.
1877
March 12.

Stoppage in Transitu—Unpaid Vendor—Arrival of Goods at Destination—Possession of Carriers also Warehousemen.

Goods were purchased of *B.* in *London* by *A.*, residing at *Falmouth*. On the 27th of October, 1876, *B.* delivered the goods for shipment on a steamer calling at *Falmouth*, and on the same day posted an invoice to *A.* On the 29th of October the steamer left *London*, and on the 31st arrived at *Falmouth*, where the goods were discharged on the quay and taken to the warehouse of *C.*, who was the agent of the *Steam Packet Company*, and in the habit of holding goods landed from the steamers at the risk and subject to the order of the consignees, and also with the exclusive right as between himself and the *Steam Packet Company* of delivering goods to the consignees.

On the 30th of October *A.* committed an act of bankruptcy by absconding from *Falmouth*, and on the 4th of November, 1876, he was adjudicated bankrupt.

On the 4th of November *B.* telegraphed instructions to *C.* not to deliver the goods:—

Held, that the *transitus* had not ended on the arrival of the goods at *Falmouth*, and transfer to the warehouse of *C.*, who, in the absence of instructions, held them as forwarding agent, and not as an agent for *B.* to keep the goods; and, accordingly, that the right of *B.* as unpaid vendor, to stop the delivery of the goods prevailed as against the claim of *A.*'s trustee in bankruptcy.

Statement.

THIS was an appeal from an order of the *Truro* County Court declaring that certain goods specified in an invoice of the 27th of October, 1876, and purporting to have been sent by Messrs. *Barrow & Sons*, of *Bermondsey*, to *Jonathan Worsdell*, the bankrupt, belonged to and formed a portion of the bankrupt's estate; and ordering delivery of the goods to the trustee in bankruptcy on payment by him of all freight or other lawful charges in respect of the carriage of the goods.

In October, 1876, Messrs. *Barrow & Sons*, the Appellants, who were leather merchants in *Spa Road, Bermondsey*, received an order from *Jonathan Worsdell*, of *Falmouth*, the bankrupt, for goods to the value of £208. *Worsdell* gave on account of these goods his cheque for £50, dated the 10th of November, 1876, and promised to accept a bill for the remainder.

On the 27th of October, 1876, *Barrow & Sons* sent an invoice of the goods to *Worsdell*, stating that the goods (not insured) would leave by next steamer; and on the same day, no directions having

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been given by *Worsdell* as to sending the goods, they sent the goods to the *West Kent Wharf, Southwark*, for the purpose of being shipped on board the Irish steamer which called at *Falmouth*.

The steamer *Countess of Dublin* left *London* on Sunday, the 29th of October, and reached *Falmouth* on the 31st. The goods when landed on the quay were taken to the wharf of *Carne & Co.*, wharfingers and agents at *Falmouth* for the *Steam Packet Company*.

On the evening of the 30th or morning of the 31st of October the manifest or bill of lading of goods shipped for *Falmouth* arrived at *Falmouth*. In this document the names of the consignors did not appear, but the names of the consignees, including *Worsdell*, for 9 bales and 2 trusses of leather, with the rate of freight and freight to pay were stated.

On the 30th of October *Worsdell* committed an act of bankruptcy by absconding from his home at *Falmouth*. On the 2nd of November a petition was presented and a receiver appointed, and on the 4th of November *Worsdell* was adjudicated bankrupt.

On the same day *Barrow & Sons*, having heard that their debtor had absconded, sent a telegram to *Carne & Co.*, and also wrote to them, to stop the delivery of the goods. The bailiff of the County Court endeavoured to obtain possession from *Carne & Co.*, but, acting on the advices from *Barrow & Sons*, they retained the goods. The cheque was not presented, and the bill for the balance of the purchase-money was never accepted by the bankrupt.

On the 16th of February the Judge of the *Truro* County Court held that the *transitus* was at an end when the steamer arrived at *Falmouth*, and, accordingly, that the goods were in the possession of *Carne & Co.*, as agents for the consignee, and formed part of his estate, so as to entitle his trustee in bankruptcy as against the unpaid vendors, *Barrow & Sons*.

From this decision *Barrow & Sons* now appealed.

Messrs. *Carne* were examined *viva voce* in the County Court, and on the appeal had made an affidavit in which they stated that they carried on business at *Falmouth* as shipping agents and carriers, and were the agents there for the *British and Irish Steam Packet Company*.

They also stated in their affidavit that on the arrival of a steamer at *Falmouth* the goods were dicharged at the wharf of the *Falmouth Dock Company* into a truck and put into the ware-

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house at the *Falmouth Docks* (as happened in this case), and the course then pursued by them varied according to who the consignees were and what directions they had received from them; and if the goods were consigned to strangers not resident at *Falmouth*, Messrs. *Carne* sent them a freight-note which contained the following provision:—"Freight and charges payable on delivery. All goods are at consignees' risk after landing, and if not immediately removed will be stored at the expense and risk of the owners. Disputed weight or measurement, claims for loss, damage, &c., cannot be allowed unless a written notice of the same be sent to the office on the day of delivery. All goods are considered as liens not only for freight and charges thereon, but for all previously unsatisfied freight and charges due to the proprietors of this concern by the importers, owners, or consignees."

In the case of consignees living at *Falmouth* such freight-note was not sent, but, as a matter of convenience, a verbal message was sent instead. As soon as the goods arrived at *Falmouth* the *Steam Packet Company* ceased to have anything further to do with the goods, and when landed the goods were placed in the warehouse, where they lay at the risk and subject to the order of the consignee on his paying the freight thereon and warehouse rent (if any). One of the terms of their agency with the *Steam Packet Company* was that *Carne & Co.* had the exclusive right of delivering such goods from their warehouse, and this they invariably did on receipt of an order from the consignee, "and in this we act solely on our own account as carriers for the consignee quite independently and apart from our agency for the *Steam Packet Company*." And generally they delivered or forwarded the goods as soon as received, to another destination, as requested by the consignee, and with the view to their accommodation as much as possible. They sometimes kept a running account with persons in the habit of frequently receiving goods, and from some persons they held a general authority to forward goods as soon as received. As agents for the *Steam Packet Company* they received the goods to keep for the consignee subject to his order; and on receipt of such order, apart from the *Steam Packet Company*, they claimed and exercised the exclusive right of delivering the goods and receiving payment for the delivery. "We consider that we throughout act as agents

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for the consignee, and except in the case of a notice (such as was sent in this case), we know nothing of the consignor." The *Steam Packet Company* had no kind of control over such delivery, nor over their charges, and the company made no charge for discharging goods into the trucks on the wharf, nor for subsequent storage or carriage. *Carne & Co.* would be solely liable for damage to the goods whilst being delivered by them, but in the case of damage or injury during the transit from *London* on board the steamer the loss would fall on the consignor.

Argument.

Horne Payne, for the Appellant:—

The unpaid vendor has a right, if the vendee be insolvent, to retake the goods before they are actually delivered to the vendee, or to the person whom he intends to be his agent to take possession of and keep the goods for him; and this right of stoppage overrides the carrier's lien for a general balance, though subject to the carrier's right in respect of special charges on the particular goods: *Oppenheim* v. *Russell* (1); *Benjamin* on Sales (2). The vendor's right is not affected by part payment: *Hodgson* v. *Loy* (3); *Feise* v. *Wray* (4); *Edwards* v. *Brewer* (5); especially when, as here, the only payment has been by a post-dated and dishonoured cheque, which we say does not amount to part payment. In this case there had been an act of bankruptcy on the part of the buyer so as to justify the exercise of the right by the vendor of the goods at the time when it was exercised: *Benjamin* on Sales (6). Next, the goods did not arrive at their destination until after the act of bankruptcy, and never came into the actual, or even constructive, possession of *Worsdell*. *Carne & Co.* received the goods, in their capacity of carriers, for the purpose of forwarding them on to the buyer; and without express directions from him to retain the goods for him at their wharf, they could not of their own will convert themselves into warehousemen so as to terminate the *transitus* without the agreeing mind of the buyer: *James* v. *Griffin* (7); *Benjamin* on Sales (8). It is not suggested that there was any special communication as to these goods, or any general contract, between the bankrupt and *Carne & Co.*, so as to convert

(1) 3 B. & P. 42.
(2) Page 695.
(3) 7 T. R. 440.
(4) 3 East, 93.
(5) 2 M. & W. 375.
(6) Page 696.
(7) 2 M. & W. 623.
(8) Pages 695, 697, 707.

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their position from that of carriers into agents of the vendee to retain the goods on his behalf. The *transitus*, therefore, was not at an end when *Barrow & Son* sent their telegram to stop delivery of the goods. They were entitled, on the ground both of the insolvency of the buyer and that the *transitus* was not at end, to exercise their right of stoppage, and they have effectually done so.

Argument.

De Gex, Q.C., and *Northmore Lawrence*, for the Respondent, the trustee in bankruptcy:—

The *transitus* was at end as soon as the goods arrived at *Falmouth*, the place of their destination. As appears by the invoice and bill of lading, all that was to be done was to put the goods on board the steamer, the owners of which were the only carriers employed, and had completed their contract when they landed the goods on the quay at *Falmouth*; the despatch to which place was the only voyage agreed upon. *Carne & Co.* received them, not as carriers, but as agents, to keep them until the further orders of the vendee, and the goods "had so far gotten to the end of their journey that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and without such orders they would continue stationary": *Dixon* v. *Baldwen* (1); *Wentworth* v. *Outhwaite* (2). The delivery to the purchaser took place when the goods were landed on the quay at *Falmouth*, when the *transitus* prescribed by the vendor was at an end. Anything further would be a *transitus* prescribed by the purchaser, and the right to stop the goods did not after that arrival exist: *Ex parte Gibbes* (3).

Judgment.

BACON, C.J.:—

All these cases are very nice, no doubt, but notwithstanding the multitude of cases on the subject, there is a very clear principle to be deduced. The facts unquestionably are these: The goods are sold and kept in *London* to be delivered to *Worsdell* at *Falmouth*; the vessel goes to *Falmouth*, the goods are transferred from the ship to the shore, and that operation is performed by *Carne*, who is so far the agent of the shipping company. He is not to part with possession of these goods until he gets the freight and charges.

(1) 5 East, 174. (2) 10 M. & W. 436.
(3) 1 Ch. D. 101.

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That is clear. They are lying on the quay, and he takes them into a warehouse. I do not think that has very much to do with it. If the weather would destroy or injure them, it would be a very business-like mode of proceeding that he should take them into the warehouse; but whether on the quay or the warehouse, I think that is the place to which the goods had so far been carried. Whether the *transitus* ended there, so that an unpaid vendor cannot claim his right to stoppage, is what I have to decide. Now the shipping broker says that he sustains two characters. First, he is agent for the shipping company, and then, having got possession of the goods for the shipping company, his next duty is one of a different kind: it is to announce to the consignee that he holds their goods, first, that he may get payment of the freight, and next that he may deal with these goods as the consignee directs him. But until that is done, can it be said that the right is gone? The shipping company would not allow the goods to be parted with until their charges are paid, and therefore the agent would never suffer *Worsdell* to take them until the charges were paid. He says his course of business would be that a person, if living at a distance, would receive from him a written notice; anybody living in the town would receive a verbal notice. Neither the one nor the other was done in this case. The fact seems to be established that at the time the goods were shot out on the quay the purchaser had absconded, and any notice to him would have produced no result. At any rate, he was not forthcoming. He was not there either to claim the goods or to have a notice given to him that the goods were come, or to direct the fresh destination. That makes the case very different from *Wentworth* v. *Outhwaite* (1). In that case not only was there an end of the *transitus* but there had been actual possession. Carts had been sent to carry away one half of the flax, and the other half remained because the purchaser had not time enough or carts enough to carry it away. But the *transitus* was at an end, and he was the owner of the goods, and no other person alive, paid or unpaid, could claim the ownership. In the case decided by myself, *Ex parte Gibbes* (2), the goods upon their arrival at *Liverpool* were paid for by bills, not good bills, by reason of subsequent failure, but they were paid for. The goods arrived at *Liverpool*; the purchaser acquired a right from having

(1) 10 M. & W. 436. (2) 1 Ch. D. 101.

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accepted the bills and performed the condition to demand from the shipmaster the delivery of the goods. He exercised that right, and I could not adopt the argument that after that they remained *in transitu*. Several extracts have been read to me from Mr. *Benjamin's* work. Of course that is only to be taken as a learned person's exposition of the law, not as an authority; but it is so clear, and points out so clearly the difficulties which beset this question, and the conclusion which ought to be drawn from decided cases, that I feel myself compelled to refer to it. [His Lordship read from *Benjamin* on Sales (1): "The other questions, &c. . . . ., but all agreed that the sole question was whether the wharfingers were in possession *qua* agents of the buyer." Now, if Mr. *Carne* says he was the agent of the buyer, I ask who constituted him that agent? What right had he to make himself the buyer's agent? It was his duty to receive the goods, and it was his duty not to part with them until he was paid for the freight. I do not think it was the less his duty to put them in a place where they could not be injured. Beyond that, he had nothing more to do with him than I had. There was no communication of the intention of the buyer, but the goods remained in Mr. *Carne's* possession. The unpaid vendor tries to get possession of them, finding that his purchaser has failed and cannot be found anywhere, and that if he does not get them back he will lose their value. The case differs much from the two cases which have been cited, and seems to me to come within the principle of law which is mentioned in Mr. *Benjamin's* book, and which is supported by the authorities which he refers to, and every other authority that I know of which applies to this subject. The *transitus* was to end at *Falmouth*, no doubt. The *transitus* might so end that the buyer could acquire possession; but until the buyer does something to evince an intention of possessing them, in my opinion the right of the unpaid vendor to stop these goods, which had never left his hands except to go on board the ship, remained. The order which has been appealed from must therefore be discharged; but as it is a very nice question, indeed, there will be no costs on either side.

Solicitors: *H. Montagu; Gregory, Rowcliffes, & Rawle*, agents for *Tilly & Co., Falmouth.*

(1) Page 707.

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C. J. B.
1877
July 23.

In re MILLER. *Ex parte* WARDLEY.

Liquidation—Contingent Debt—Payment by Trustees of Premiums on Husband's Life Policies—Proof based on Estimate—Death of Insured before Receipt of Dividend—Reduction of Proof.

By a marriage settlement a fund was impressed with a trust to pay such premiums upon policies of assurance on the husband's life, assigned by the husband to the trustees, as he should fail to pay; and the husband covenanted with the trustees to pay the premiums. In 1871 the husband filed a liquidation petition, after which the trustees paid the premiums out of the wife's life estate. The husband's covenant was valued at £2052 8*s.*, and a claim for that amount was taken in by the settlement trustees, and in December, 1875, was admitted as a proof. In April, 1876, a dividend of 10*s.* was declared, but before the amount reached the hands of the settlement trustees, the husband, on the 13th of May, 1876, died. At that time the sums which had been disbursed by the settlement trustees amounted to £766 5*s.*:—

Held, that the settlement trustees were not entitled to receive the whole dividend which had been declared, but only the amount of their payments for premiums with such interest as the dividend had been actually making.

Statement.

THIS was a motion by way of appeal from the Registrar, sitting as County Court Judge at *Leicester*, that an order made on the 2nd of May, 1877, might be discharged or varied; and that the proof of *John Phillips* the younger and three others, which had been allowed for the sum of £2052 8*s.*, might be expunged or reduced.

By an indenture dated the 7th of October, 1858, and made between *John Phillips* the elder of the first part, *Monica Mary Phillips* of the second part, *Thomas Miller* of the third part, and *John Phillips* the younger, *Ralph Brown*, *Thomas Goldsborough Anderson*, and *Joseph Phillips* the younger, of the fourth part, being the settlement made prior to the marriage of *Thomas Miller* and *Monica Mary Phillips*, it was witnessed that *John Phillips* the elder, father of the intended wife, covenanted to pay during his life to the trustees an annuity of £400 upon trust that the trustees should out of the said annuity pay all the premiums on five life policies thereinafter assigned, or such of them or such part thereof as *Thomas Miller* should neglect or refuse to pay, and all other the premiums, costs, charges, and expenses which the said trustees

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should expend in keeping on foot the said policies, or any other policies which might be effected by the trustees under the provisions thereinafter contained; and after such several payments that the said trustees should during the joint lives of *Thomas Miller* and *Monica M. Phillips* pay and apply the unapplied portions of the said annuity for the separate use of *Monica M. Phillips* without power of anticipation, with remainder to her children on attaining twenty-one; and *John Phillips* further covenanted that his heirs, executors, or administrators would within six months after his decease pay to the trustees the sum of £5000; and it was declared that the trustees should invest the £5000 and hold the same, and the income arising therefrom, upon the same trusts as to the income as were thereinbefore expressed with regard to the annuity of £400. It was further witnessed that *Thomas Miller* assigned to the trustees five policies for £1000 on his own life, and all moneys to be received by virtue thereof, upon trust to invest the same, and to pay the income to *Monica M. Phillips* for life for her separate use, with remainder as to the principal for the children of the marriage on attaining twenty-one, with an ultimate remainder to *Thomas Miller*, absolutely. The deed also contained the following covenants:—

"And the said *Thomas Miller* doth hereby for himself, his heirs, executors, and administrators, covenant with the said *John Phillips* the younger, *Ralph Brown*, *Thomas Goldsborough Anderson*, and *Joseph Phillips*, their executors, administrators, and assigns, that he the said *Thomas Miller* shall and will from time to time and at all times hereafter during his life at his own proper costs and charges regularly pay the annual premiums hereafter to grow due upon or by virtue of the said several policies of insurance hereinbefore assigned or expressed, or intended so to be, as and when the same respectively shall become payable."

Thomas Miller further covenanted to produce the receipts for the premiums paid; that he would not invalidate the policies; and for further assurance; and then followed this declaration:—

"And it is hereby declared and agreed by and between the said parties to these presents, that in case the said *Thomas Miller* shall neglect to pay such annual premiums as aforesaid, or any of them, or to produce such receipts or vouchers for the same as aforesaid, within twenty days after such annual premiums become due

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C. J. B. 1877 *In re* MILLER. *Ex parte* WARDLEY. Statement.

respectively, and ought to be paid, as hereinbefore mentioned, then and in such case it shall be lawful for the said trustees or trustee to effect such insurance or insurances in the aforesaid or any other insurance office, and to obtain any other policy or policies of insurance in the name of them the said trustees or trustee or in the name of the said *Thomas Miller*, and so from time to time to keep the life of the said *Thomas Miller* constantly insured to the amount at least of £5000, and to retain and reimburse themselves or himself out of the said annuity or yearly sum of £400, or out of the interest or annual income of the said sum of £5000 hereinbefore respectively covenanted to be paid to them or him, all such costs, charges, and expenses as they or he shall expend in effecting or keeping such policies of insurance on foot as aforesaid or in relation thereto."

There was issue of the marriage one child, a son, now of the age of twelve or thereabouts.

John Phillips regularly paid the annuity of £400 up to his death, on the 29th of March, 1871. After his death his executors regularly paid interest at 4 per cent. on the £5000 to the settlement trustees until they paid off the principal.

Thomas Miller regularly paid the premiums on the policies from the marriage to the 8th of May, 1871, when he presented a liquidation petition.

On the 3rd of June, 1871, *George Sale Wardley* and *Thomas Brown* were appointed trustees under the liquidation.

On the 7th of October, 1871, and on the same day of every subsequent year up to and including 1875, the trustees of the settlement (hereinafter called the trustees) paid the annual premiums of £153 5*s*. on the policies out of the income of the £5000, and paid the balance to Mrs. *Miller* for her separate use.

The amount of the annual premiums thus deducted from Mrs. *Miller's* separate income was, without interest, £766 5*s*.

On the 15th of May, 1874, the trustees carried in a claim against the estate of *Miller* for £2086 19*s*., as the value of his covenant for the payment of the premiums.

In July, 1874, a decree *nisi* for a divorce was pronounced in a petition by Mrs. *Miller* against her husband. The proof by the trustees had not then been admitted, and on the 17th of August, 1874, the solicitors of the liquidation trustees wrote to the soli-

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citors of the trustees requesting Mrs. *Miller* to release her trustees from setting up their claim.

On the 27th of August, 1874, the solicitors of the trustees wrote in answer to say they did not consider the trustees could be absolved by any consent Mrs. *Miller* might give from proving against the husband's estate. They continued, "But are you sure you should oppose this proof in the interest of *Miller's* creditors? Are you prepared to say what the settlement trustees should do with the dividend when they get it? There appear to be three courses which might be adopted: 1. To pay the dividend to the insurance company and get a reduction of the future annual premiums; 2. To invest the dividend at interest, and apply the income annually in payment of the premiums; 3. To invest the dividend at interest and apply the income and part of the principal in payment of premiums so long as the dividends will last. By the two latter courses there would be some possible interest in the dividend remaining to the creditors if *Miller* died soon."

After further correspondence, on the 24th of August, 1875, the liquidation trustees rejected the proof, but upon application being made to the County Court at *Leicester*, proof was, on the 29th of December, 1875, admitted for the sum of £2052 8*s*., being the agreed amount (founded on the estimate of two actuaries) which would have been required by the office, on the 8th of May, 1871, to commute all future payments on the policies.

On the 13th of April, 1876, a first dividend of 10*s*. was declared, and made payable on the 1st of May following.

Before a receipt for this dividend by the trustees (two of whom had gone to the Continent) could be signed by them, that is to say, on the 13th of May, 1876, *Thomas Miller* died.

Thereupon the solicitors of the trustees, on the 15th of May, wrote to the liquidation trustees, saying they presumed that *Miller's* death would make a difference in the disposition of the dividends under the liquidation. It seemed to the writers that when the premiums that had been paid by the trustees out of Mrs. *Miller's* income, with interest on them from the time of payment, had been paid to her, the liquidation trustees would be entitled to the balance for the benefit of the rest of the creditors.

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Statement.

On the 2nd of August, 1876, two new trustees of the settlement were appointed.

The liquidation trustees refusing to pay the dividend, the trustees on the 7th of February applied to the Court for an order that the same might be paid to them.

On the 18th of April, the liquidation trustees applied to the Registrar to expunge or reduce the proof.

On the 2nd of May an order was made on both applications, that the liquidation trustees do pay to the trustees the dividend due to them, with bankers' interest thereon from the 15th of May, 1876.

This was the order from which the liquidation trustees now appealed.

Argument.

Yate Lee, for the Appellants:—

The order is opposed to two bankruptcy rules: one, that under no pretence shall any claimant under a bankruptcy be entitled to more than 20*s.* in the pound; the other that, supposing the proof to have been properly admitted at the time, circumstances have since occurred which shew that it ought to be expunged.

This dividend is not trust money; no trust of it is declared by the settlement. The usual form is for the husband first to covenant to pay the premiums, with power to the trustees, if he should fail, to effect fresh policies, and keep up the premiums out of income, and (if necessary) capital. Here there is a primary trust to keep up the premiums which the husband should fail to pay on the existing policies, or any other policies which might be effected by the trustees.

[BACON, C.J.:—In this instance no other policies have been effected.]

The £5000 paid by the wife's father's executors is the primary fund; and *Miller's* estate the secondary fund.

[BACON, C.J.:—There is a covenant by *Miller* with the trustees, which he has broken; for that breach his estate is liable.]

As to reducing the proof: If this dividend be paid to the settlement trustees, they will be getting more than 20*s.* in the pound for their debt.

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[BACON, C.J.:—Not out of the bankrupt's estate.]

Beyond this, the facts are, that a proof is admitted on an estimated value, which is agreed upon. Then, before the dividend is paid, some circumstances happen which, if they had happened before the proof was tendered, would have caused it to be rejected. A proof tendered to-day would not be accepted. "Wherever a proof would have been refused, had the facts come before the Court when the proof was tendered, it may, if entered, be expunged, on the same facts being shewn, and this even though the facts may not actually have happened at the time the proof was entered, if, supposing they had then happened, the proof would have been disallowed": *Griffith & Holmes'* Bankruptcy (1), referring to *Ex parte Smith* (2). Where a debt proved became satisfied by a legacy, the proof was ordered to be reduced by the amount of the legacy: *Ex parte Man* (3); and so where bills on other parties held by the creditor as collateral security for the debts proved were paid: *Ex parte Brunskill* (4).

De Gex, Q.C., and *Vernon Smith*, for the trustees:—

This is a covenant by *Miller*, which has been broken. Its value was estimated by an actuary, and the amount agreed upon. The value cannot depend upon the accident of *Miller's* death. The principal fund is the husband's covenant, and this dividend is a compensation to the wife for the loss of her income. The Court will not decide that the proof is to be reduced by the accident of the life falling in sooner than was expected. According to the argument on the other side, if *Miller's* life had been prolonged, and Mrs. *Miller* had gone on paying these premiums to a far larger amount than £1026 4*s*., she would have been entitled as against the liquidators to more than her dividend on the £2052 8*s*.

Judgment.

BACON, C.J.:—

I cannot enter into that suggestion.

The fact is that this is a broken covenant upon which damages may be recovered. I must consider the contract between the parties. I have already stated what seems to me to be a just and

(1) Vol. i. p. 708.
(2) 3 M. D. & D. 341.
(3) Mont. & McA. 210.
(4) 4 Dea. & Ch. 442.

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proper mode of dealing with this case, which is not without difficulty; and when I suggest that all the trustees can recover is the actual amount of their outlay in the payment of these premiums, their answer is, "Is that the amount for which our debt has been proved?" Well, it is not; but then the Court is not precluded from looking at the whole transaction. I find that the husband is to pay the premiums, and in case of his default there is a fund provided elsewhere to keep alive these policies of assurance, in order that the moneys secured by them may be forthcoming. But what trusts are declared of the difference between the sums that the trustees have disbursed and the much larger sum that they claim to receive by way of dividend?

It now appears that in the event that has happened the value of the covenant that was assessed was excessive; but that is no reason why I should refuse to do strict justice to the settlement, and give to the parties under it the benefit of the obligation which the bankrupt's estate was under.

No case, therefore, has been shewn for expunging the proof. The full sum which the trustees have disbursed ought to be repaid to them. To that extent the contention of the trustees is right. I think that the liquidation trustees ought to pay to the settlement trustees out of this dividend the full amount which has been paid by them since 1871, and I also think the settlement trustees must have their costs.

As to interest, I do not see my way.

After some discussion, it was agreed that the settlement trustees should have upon their payments such interest as the fund had been making at the bankers since the declaration of the dividend.

Solicitor for Appellants: *G. J. Brownlow*, agent for *Watson & Baxter, Lutterworth.*

Solicitors for Respondents: *Peacock & Goddard*, agents for *Thompson, Phillips, & Evans, Stamford.*

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BANKRUPTCY—*Composition—Failure to pay—"Injustice or undue Delay to Creditors"—Power of Court to adjudicate Debtor a Bankrupt—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 125, 126—*Bankruptcy Rules*, 1870, *r.* 252—*Bankruptcy Forms*, 1870, *No.* 106.] The power given to the Court by sect. 126 of the *Bankruptcy Act*, 1869, to adjudge a compounding debtor a bankrupt is a discretionary power, and is independent of the commission by him of an act of bankruptcy, and it may be exercised more than six months after the filing of the liquidation petition.—A declaration by the debtor of his inability to pay one of the instalments of the composition at the time appointed is a sufficient ground for the exercise of this power.—Whether, under such an adjudication, the title of the trustee in the bankruptcy would have any relation back, *quære*.—Decision of *Bacon*, C.J., affirmed. *Ex parte* CHARLTON. *In re* CHARLTON - - - C. A. 45

BANKRUPTCY—*continued.*

2. —— *Debtor's Summons—Debt due to Infant—Next Friend—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 7.] An infant creditor may issue a debtor's summons in his own name.—*Semble*, that in such case the debtor would be entitled, if he asked for it, to have some adult person named as security for the costs of the summons.—But if he makes no such application, but allows the summons to proceed in the ordinary way, an adjudication of bankruptcy, founded upon non-compliance with it, is valid. *Ex parte* BROCKLEBANK. *In re* BROCKLEBANK - - - C. A. 358

3. —— *Debtor's Summons—Staying Proceedings—Security—Discretion of Judge—Pending Action for same Debt with specially indorsed Writ—Bankruptcy Act*, 1869, *s.* 7—*Rules of Court*, 1875, *Order XIV., rr.* 1, 6.] When an order is made staying the proceedings on a debtor's summons, the fact that in a pending action by the summoning creditor for the same debt, with a specially indorsed writ, the Plaintiff has not attempted, under Rules of Court, 1875, Order XIV., rules 1, 6, to obtain security for the debt, is not a conclusive reason for staying the proceedings on the summons without security.—*Ex parte Latham* (4 Ch. D. 105) distinguished. *Ex parte* HOSFORD. *In re* SMITH - - - - C. A. 215

4. —— *Execution Creditor—Trader—Action for Debt above £50—Abandonment by Plaintiff of Part of his Claim—Judgment signed for less than £50—Bankruptcy before Sale by Sheriff—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 87.] A creditor who has sued a trader for a debt exceeding £50 is entitled to abandon part of his claim, and to sign judgment for a sum less than £50, so as to avoid the operation of sect. 87 of the *Bankruptcy Act*, 1869. *Ex parte* REYA. *In re* SALINGER - - - - - C. A. 332

5. —— *Jurisdiction—Discretion—Foreclosure Action by Equitable Mortgagee—Validity of Mortgage denied by Trustee—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 72.] An equitable mortgagee by deposit of title deeds of a bankrupt commenced in the Chancery Division an action against the trustee in the bankruptcy for an account and foreclosure in default of payment. The trustee, who alleged that nothing was due on the mortgage, but that it had been concocted to defeat the bankrupt's creditors, examined the mortgagee and other witnesses in the Court of Bankruptcy, and applied to that Court (after the commencement of the action) for an order for delivery up of the title deeds by the mortgagee:—*Held*, that the Registrar was right in making an order dismissing this application, with liberty to either of the parties to apply after the conclusion of the proceedings in the action.—Observations on the jurisdiction of the Court of Bankruptcy under sect. 72 of the *Bankruptcy Act*, 1869. *Ex parte* PANNELL. *In re* ENGLAND C. A. 335

6. —— *Preferential Debt—Rent—Distress—Money due to Gas Company for Gas supplied—"Landlord or other Person to whom Rent is due"—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.*

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BANKRUPTCY—*continued.*

12, 13, 34—*Bankruptcy Rules*, 1870, *r.* 260.] The special Act of a gas company empowered them to levy by distress all sums of money due to them for the supply of gas, the amount of which should not be disputed, and provided that any justice, on application, might inquire into and ascertain the amount due, and issue his warrant accordingly for levying the same. By sect. 16 of the *Gasworks Clauses Act*, 1847 (incorporated with the special Act), money due to a gas company for gas supplied is spoken of as "rent." The company, after one of their customers had filed a liquidation petition, and with notice of the petition, proceeded to seize his goods under a distress warrant granted by the justices in respect of money due for gas supplied to him within a year before the filing of the petition:—*Held*, the company did not come within the words "landlord or other person to whom any rent is due from the bankrupt" in sect. 34 of the *Bankruptcy Act*, 1869, but that the distress was a legal process against the estate of the debtor in respect of a provable debt, which the Court had, under sect. 13 of the Act, or under rule 260 of the Bankruptcy Rules, 1870, power to restrain.—A perpetual injunction was accordingly granted to restrain the company from enforcing the distress.—*Ex parte Birmingham and Staffordshire Gaslight Company* (Law Rep. 11 Eq. 615) distinguished. The words "other person to whom any rent is due" in sect. 34 apply to a case where rent is payable in respect of a tenancy, though the person entitled to the rent is not in popular language a "landlord." *Ex parte* HILL. *In re* ROBERTS - - - - C. A. 63

7. —— *Proof—Liquidation—Contingent Debt—Payment by Trustees of Premiums on Husband's Life Policies—Proof based on Estimate—Death of Insured before Receipt of Dividend—Reduction of Proof.*] By a marriage settlement a fund was impressed with a trust to pay such premiums upon policies of assurance on the husband's life, assigned by the husband to the trustees, as he should fail to pay; and the husband covenanted with the trustees to pay the premiums. In 1871 the husband filed a liquidation petition, after which the trustees paid the premiums out of the wife's life estate. The husband's covenant was valued at £2052 8*s.*, and a claim for that amount was taken in by the settlement trustees, and in December, 1875, was admitted as a proof. In April, 1876, a dividend of 10*s.* was declared, but before the amount reached the hands of the settlement trustees, the husband, on the 13th of May, 1876, died. At that time the sums which had been disbursed by the settlement trustees amounted to £766 5*s.*:—*Held*, that the settlement trustees were not entitled to receive the whole dividend which had been declared, but only the amount of their payments for premiums with such interest as the dividend had been actually making. *Ex parte* WARDLEY. *In re* MILLER - - C. A. 790

8. —— *Receiver—Liquidation—Power of Creditors to appoint—Substitution of Nominee of Creditors for Receiver appointed by Court—Bankruptcy Rules*, 1870, *rr.* 260, 262.] The power of appointing a receiver given to the creditors by the first part of rule 262 of the Bankruptcy Rules, 1870, can only be exercised when no receiver has been appointed by the Court.—The latter clause of the rule means that the nominee of the creditors, after they have acquired the status of creditors by proving their debts at the first meeting, shall be substituted for the receiver previously appointed by the Court, the object being to provide for the possibility of the creditors at the first meeting not being able to agree upon a trustee, and adjourning the meeting for the further consideration of his appointment.—Decision of *Bacon*, C.J., affirmed. *Ex parte* RYLANDS. *In re* CHESTERS C. A. 57

9. —— *Receiver—Liquidation by Arrangement—Creditor under Bill of Sale repeatedly renewed—Receiver appointed under Bankruptcy Petition—Rights of Liquidation Trustee.*] In order to secure an advance by *F.* to *P.*, the liquidating debtor, a bill of sale of part of *P.'s* property was on the 30th of March, 1876, executed by *P.* to *F.* on the agreement that the deed should not be registered for six (and afterwards for nine) months, if *P.* would execute a new bill of sale when called upon to do so. Accordingly, at intervals of about twenty-one days, the bill of sale was renewed fourteen times, the fifteenth and last deed being executed on the 11th of January, 1877. The first and last only of the series were stamped, and the last only was registered. Each deed recited a loan at the date of the deed of the amount purported to be thereby secured: but in fact there was only one loan, increased on two occasions by further advances.—In the interval, that is to say, on the 26th of September, 1876, the debtor committed an act of bankruptcy by neglecting to satisfy a summons served by *B.*, a debtor; and on the 6th of December *B.* served on the debtor a petition for adjudication in bankruptcy, under which a receiver was appointed on the 9th of December. The petition for liquidation was filed on the 18th of January, 1877; and on the 5th of February, *F.*, the bill of sale holder, purchased and took an assignment of the debt of *B.*:—*Held*, that whatever might be the validity of the bill of sale of the 11th of January, 1877, at law, it was wholly invalid in bankruptcy, on the grounds that it purported to convey property which was then vested in the receiver; 2, that it was based on an untrue recital; and, 3, that it was part of a scheme to defeat the operation of the bankruptcy laws; and that the title of the trustee in liquidation related back to the act of bankruptcy under the debtor's summons:—*Held*, further, that the purchase by the bill of sale holder of the summoning creditor's debt, though it might purge the act of bankruptcy as between the debtor and creditor, could not abrogate the proceedings in bankruptcy, so as to defeat the rights of the other creditors. *Ex parte* FURBER. *In re* PELLEW - - - - - 181

10. —— *Receiver—Liquidation—Appointment by Creditors—Confirmation by Court—Appeal—Locus Standi—Bankruptcy Rules*, 1870, *r.* 262.] Immediately after a debtor had filed a liquidation petition two sets of persons, each professing to be a majority in value of his creditors, respectively signed two nomination papers under rule 262 of the Bankruptcy Rules, 1870, nominating and appointing two different persons to be receiver of the debtor's property. Upon the application of one of these sets of persons the Registrar ap-

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BANKRUPTCY—*continued.*
pointed their nominee receiver:—*Held*, that the nominee of the other persons had no *locus standi* to appeal from the Registrar's order, though the persons who had nominated him would have had a right to appeal. *Ex parte* Cooper. *In re* Joseph - - - - - - **C. A. 255**

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—— *Valpy & Chaplin, Ex parte* (Law Rep. 7 Ch. 289), disapproved of - - **556**
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—— *York, Mayor of*, v. *Pilkington* (2 Atk. 302) disapproved - - - - **463**
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CHARITY—*Mortmain—Corporation having Power to take Land by Devise before* 9 *Geo.* 2, *c.* 36—*Confirmation by later Acts.*] By a statute of Queen *Anne* a corporation was established to provide for the relief of the poor within a certain district, with power to raise money for that purpose, and it was enacted that it might without license in mortmain acquire land by gift or devise, and that any persons might without further license give or devise land to it. After the passing of 9 Geo. 2, c. 36, several Acts relating to this corporation were passed, giving it additional powers, but not referring to the above-mentioned clause as to acquiring land, and in these Acts were contained clauses providing that the clauses and powers of the former Acts should remain in force and be executed as fully as if they were therein re-enacted:—*Held*, by *Hall*, V.C., and by the Court of Appeal, that the charity was not exempted from the operation of 9 Geo. 2, c. 36; and that a bequest to it of moneys to arise from the sale of real estate was void.—*Perring* v. *Trail* (Law Rep. 18 Eq. 88) distinguished. LUCKRAFT *v.* PRIDHAM **C. A. 205**

2. —— *Mortmain — Pure and Impure Personalty—Premium upon granting a Lease—Costs—Marshalling Assets.*] A testatrix bequeathed to an hospital all her household furniture and other things in her dwelling-house, and also all her ready money, money at the bankers, and money in the public stocks or funds of *Great Britain*, and also all other of her personal estate and effects which she could by law bequeath to such an institution, and she appointed executors, but made no further disposition of her property, real or personal:—*Held*, that the charitable bequest was a specific bequest, and that the debts, funeral and testamentary expenses, and costs, must be paid first out of the undisposed of personal estate, next out of the real estate, and lastly out of the specific bequest; but that the specific bequest must exonerate the real estate from probate duty.—The testatrix, long before her death, had granted a lease of a house for thirty-one years at a low rent, with a premium of £600, which had not been paid:—*Held*, that the unpaid premium being in the nature of purchase-money, for which there was a lien upon the land, could not be bequeathed to a charity. SHEPHEARD *v.* BEETHAM - **597**

3. —— *Mortmain—Railway Company—Debenture Mortgage—Assignment of Undertaking and Tolls — Interest in Land.*] A debenture mortgage made by a railway company in the form given in Schedule C of the *Companies Clauses Consolidation Act*, 1845, does not give the debenture holder an interest in land within the *Statute of Mortmain*. *In re* MITCHELL'S ESTATE. MITCHELL *v.* MOBERLY - - - - - **655**

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COMPANY—*Action against Directors—Member—Transfer of Shares to increase Voting Power—General Meeting—Rejection of Votes—Injunction—Right to use Name of Company.*] Where the articles of association of a limited company provided that the company should not be affected with notice of any trust, and contained provisions that every member should be entitled to one vote at a general meeting for every ten shares, but should not be entitled to more than 100 votes in all, and that no member should vote at any general meeting unless he had been possessed of his shares for three months previously thereto:—*Held*, that, according to the articles, a member of the company was a person whose name was on the register of shareholders; that the register was the only evidence by which the rights of members to vote at a general meeting could be ascertained; and that at a general meeting no votes of shareholders properly qualified and whose names had been three months on the register should be rejected on the ground that their shares had been transferred to them by other shareholders for the purpose of increasing their own voting power, or with an object alleged to be adverse to the interests of the company, or on the ground that the holders were not beneficial owners of the shares.—An action was brought by a shareholder whose vote was rejected, on behalf of himself and all others who had voted with him, naming the company as co-Plaintiff, against the directors, for an injunction to restrain them from acting on the footing of the votes being bad:—*Held*, that the Plaintiffs were entitled to an injunction:—*Held*, also, that till a meeting should be called to decide whether or not the company's name should be used as Plaintiff, the company's name should remain on the record. PENDER *v.* LUSHINGTON - - - - **70**

2. —— *Action by one Shareholder on behalf of himself and others—Company's Authority to sue—Secret Contract—Right to use Name of Company—Demurrer—Rules of Court*, 1875, *Order* XXVIII., *r.* 8—*Making Company Plaintiff without Consent—Charges of Fraud—Costs.*] A shareholder in a company brought an action on behalf of himself and the other shareholders against the company's solicitors and vendor to set aside an alleged secret and fraudulent contract, and to recover a large sum of money for the company from their solicitors, the company being joined as Defendants instead of Plaintiffs.—A demurrer to the statement of claim by the Defendants, other than the company, on the ground that the action could only be maintained by the company, was allowed, but the Plaintiff obtained leave under Rules of Court, 1875, Order XVI., r. 2, to amend his writ and statement of claim by adding the company as Plaintiffs, the production by him of any authority from the company to sue in their name being held to be unnecessary. — As the Plaintiff charged fraud against the demurring Defendants, the question whether their costs of the demurrer should be paid by him was reserved till the trial of the action. DUCKETT *v.* GOVER - - - **82**

3. —— *Agreement in Articles that Shareholders*

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COMPANY—*continued.*

shall contribute to certain Debts—Insolvent Shareholders—Interest.] A company was formed under the Act of 1856, with a capital of £160,000 divided into £10 shares, and the memorandum stated that the liability of the shareholders was limited. The articles provided that certain debts of specified amount which had been incurred by six of the shareholders in forming the company should be paid by the company, and that if the company should not have sufficient funds to pay them, each shareholder for the time being should contribute and pay to the company a proportionate amount of those debts according to the number of shares of each shareholder. The shares were not all allotted. The company having been ordered to be wound up:—*Held*, by *Malins*, V.C.—1. That the agreement to contribute to these debts was legal, and could be enforced by a call, though the shares had been fully paid up. 2. That each shareholder must contribute a sum bearing to the whole of the debts the same proportion as the number of his shares bore to the whole number actually allotted. 3. That if any of the shareholders were insolvent, the solvent shareholders must contribute *pro ratâ* the amounts which the insolvent shareholders failed to pay. 4. That the six shareholders were not entitled to interest upon large sums which they had paid for interest on the debts.—*Held*, on appeal, that the decision of the Vice-Chancellor as to points 1, 2, and 4, ought to be affirmed; but that no shareholder was liable to pay any further proportion in consequence of the inability of any other shareholder to pay his proportion. *In re* MARIA ANNA AND STEINBANK COAL AND COKE COMPANY. McKEWAN'S CASE - - - C. A. 447

4. —— *Profit made by Promoter—Fiduciary Relation—Contract not mentioned in Prospectus—Commission—Offer by Plaintiffs to allow Commission and Expenses—Solicitor of Company—Costs.*] The Plaintiffs were a joint stock company which was formed for the purpose of purchasing and working a colliery and ironworks formerly the property of *J. Bagnall*, deceased. Before the company was formed *J. Bagnall's* trustees entered into negotiations with *R.*, a financial agent, to get up a company for the purchase of the property for about £300,000. *R.* applied to *C.*, and *C.* made an arrangement with *G.* upon the terms stated below. Two contemporaneous agreements were signed, by one of which the trustees agreed to sell the property to a trustee for the company for £300,000; and by the other, which was called in the pleadings the secret agreement, the trustees agreed with *C.* that he should bring out the company or forfeit £20,000; and that they should pay £85,000 for commission and risk. On the same day *C.* agreed with *G.* that *G.* should take the whole risk of bringing out the company, and should receive £60,000 and *C.* £25,000 of this bonus. *D. & Co.*, the vendors' solicitors, were to receive £1500 from the tenant for life of the property if the purchase was completed.—The company was established, the first directors being found by *R.*; and *D. & Co.* became the solicitors of the new company. The prospectus and articles referred to the agreement for the purchase of the property, but made no mention of the agreement between the vendors and *C.*, or of any of the arrangements relating to it. The purchase-money was paid to the vendors, who paid out of it £85,000 to *C.*, of which he gave £60,000 to *G.* and £10,000 to *R.* The directors were not informed by *D. & Co.*, or any other person, of the agreement between the vendors and *C.*; but some time afterwards they discovered it, and thereupon called a general meeting of the company to consider the subject. The result was that a bill was filed by the company against the vendors and against *R.*, *C.*, *G.*, and *D. & Co.*, praying that the purchase might be rescinded, or that the Defendants might be held liable to repay all the profits which they had made by the transaction; the Plaintiffs offering to allow expenses properly incurred and a fair commission.—Before the cause came to a hearing the Plaintiffs compromised the suit with the vendors, receiving from them £31,000 as the price of not insisting on the purchase being rescinded:—*Held* (affirming the decision of *Bacon*. V.C.), that the suppression in the prospectus of the agreement between the vendors and *C.* was unjustifiable; and that the Defendants *R.*, *C.*, and *G.* were in a fiduciary relation to the intended company, and therefore could not be allowed to retain any profit which they had made without disclosing it to the company:—*Held*, also, that the compromise with the vendors did not affect the claim of the Plaintiffs against the Defendants, *R.*, *C.*, and *G.*, and that the last-named Defendants had no claim to any allowance in respect of the £31,000 paid by the vendors on such compromise:—But *held* (varying the decision of the Vice-Chancellor), that the Defendants *R.*, *C.*, and *G.* were entitled to be allowed their expenses properly incurred in bringing out the company; and that although they would not have been entitled to any commission unless the Plaintiffs had offered to allow it in their bill, the Plaintiffs could not retract their offer, and a fair commission must be allowed:—*Held*, also, that although *D. & Co.* had acted improperly in concealing from the company the agreement between the vendors and *C.*, they ought to have been dismissed from the suit when the Plaintiffs elected not to rescind the purchase; and inasmuch as *D. & Co.* had acted in the matter with no fraudulent intent, the Court dismissed the suit against them without costs up to the time of the compromise, and with costs as to all subsequent proceedings. BAGNALL *v.* CARLTON C. A. 371

5. —— *Reconstruction Scheme—Joint Stock Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104)—*Debenture Holders—Title to vote at Meeting—Bonâ fides.*] Where a reconstruction scheme was resolved upon at a meeting of debenture holders under the Act of 1870, the Court *held* that the holders of the debentures passing by delivery were not entitled to vote unless they produced their debentures at or before the meeting:—*Held*, also, that the Court would not sanction a reconstruction scheme resolved upon by a majority of debenture holders, if it should appear that persons voting in favour of the scheme were not acting *bonâ fide* in the interests of the debenture holders. *In re* WEDGWOOD COAL AND IRON COMPANY - - - - - - 627

6. —— *Voluntary Winding-up — Companies*

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COMPANY—*continued.*

Act, 1862—*Supervision Order—Creditor—Unliquidated Damages—Right to petition.*] An order continuing the voluntary winding-up of a company under the supervision of the Court can only be obtained on a petition by the company, a creditor, or a contributory.—A claim against a company for unliquidated damages on account of alleged fraudulent representation does not constitute the claimant a creditor, so as to entitle him to petition either for a winding-up order or a supervision order: before he can so petition he must make himself a creditor by changing his claim for damages into a judgment. *In re* Pen-y-Van Colliery Company - - - - 477

7. —— *Voluntary Winding-up—Preferred and Deferred Shares—Rights and Interest in Capital—Companies Act*, 1862, *s.* 133.] The articles of association of a limited company whose capital was divided into preferred and deferred shares provided that, subject to the difference in dividing the profits, the preferred and deferred shares should rank equally in the company, and that there should be no difference between a preferred and deferred shareholder in respect to his *status* and liability to the debts and engagements of the company. The articles also provided for the dissolution of the company. On the voluntary winding-up of the company under sect. 133 of the *Companies Act*, 1862:—*Held*, that the two classes of shareholders were in the same position, and entitled to the capital *pro ratâ*. Griffith *v.* Paget - - - - - - - 511

8. —— *Voluntary Winding-up—Lease—Claim by Lessor—Future Rent—Companies Act*, 1862, *s.* 158.] A banking company which had been registered under the *Companies Act*, 1862, obtained demises of premises from the Plaintiff, and covenanted to pay him rent at the usual periods during the terms. The shareholders passed a resolution for a voluntary winding-up of the company, though it was not insolvent. A question having arisen as to Plaintiff's claim for the future rent, he brought an action for an injunction to restrain the distribution of the assets until the liability of the company had been provided for:—*Held*, that the lessor was entitled to have a sum set apart which, when invested in consols, would, with half yearly rests, be sufficient to produce the amount of the rent. Oppenheimer *v.* British and Foreign Exchange and Investment Bank - - 744

9. —— *Winding-up—Leave to proceed with Action—Foreclosure Action by Mortgagee—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 87.] When an order has been made to wind up a company, a mortgagee who has commenced an action against the company to realize his security ought to have leave, under sect. 87 of the *Companies Act*, 1862, to proceed with his action, except under special circumstances, or unless the same relief is given to him in the winding-up as he would obtain in the action. *In re* David Lloyd & Co. Lloyd *v.* David Lloyd & Co. - - - C. A. 339

10. —— *Winding-up—Paid-up Shares—Companies Act*, 1867, *s.* 25—*Allotment in Consideration of future Work—List of Contributories.*] The proprietors of a newspaper agreed with an insurance company to insert a series of advertisements for the company in consideration of 100 fully paid-up shares in the company. Fully paid-up shares were accordingly allotted to them, but no contract in writing within the 25th section of the *Companies Act* of 1867 was filed at or before the issue of the shares. The newspaper proprietors sent the company a receipted bill, and subsequently duly inserted the advertisements. The company was afterwards wound up:—*Held*, that there having been, at the time of the allotment, no *bonâ fide* debt due from the company to the newspaper proprietors amounting, under the principle of *Spargo's Case* (Law Rep. 8 Ch. 407), to payment in cash within the 25th section of the *Companies Act* of 1867, the newspaper proprietors must be placed upon the list of contributories. *In re* Church and Empire Fire Insurance Company. Pagin & Gill's Case - - 681

11. —— *Winding-up—Director—Mortgage—Non-registration—Sub-mortgagee of Director—Companies Act*, 1862, *s.* 43.] A company mortgaged freehold and leasehold property to *K.*, one of their directors, who then sub-mortgaged it to *H.*, a stranger, but neither of the securities was registered under sect. 43 of the *Companies Act*, 1862, the company never having kept a register of securities. *K.* took possession under his mortgage, and the company was afterwards ordered to be wound up. The title deeds of the property were in *H.'s* possession. A summons by the official liquidator that *K.* and *H.* might be ordered to deliver up possession of the property and title deeds, was dismissed with costs. Observations on *Ex parte Valpy & Chaplin* (Law Rep. 7 Ch. 289) and *In re Native Iron Ore Company* (2 Ch. D. 345). *In re* International Pulp and Paper Company. Knowles' Mortgage - - 556

12. —— *Winding-up—Provisional Liquidator to protect Assets—Security.*] The Court will, in case of urgency, appoint a provisional liquidator, without the consent of the company, to take possession of and protect the assets, upon his undertaking to give security forthwith, and producing an affidavit of fitness to the Registrar. *In re* Hammersmith Town Hall Company 112

13. —— *Winding-up—Unpaid Costs of former Petition—Appointing Company's Solicitor Provisional Liquidator to receive Costs—Subpœna for Costs—Cons. Orders* XL., *r.* 38; XXVIII., *r.* 1.] Where a shareholders' winding-up petition had been dismissed with costs to be paid by the Petitioners to the company, and afterwards, before the costs were paid, the company was ordered to be wound up on a creditor's petition, but in consequence of a liquidator not having yet been appointed a proper discharge could not be given on behalf of the company for their costs of the first petition, the solicitor to the company was appointed provisional liquidator, without salary or security, to receive the costs, upon his making an affidavit that they had not yet been paid to him. *In re* Langham Skating Rink Company [102

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CONVERSION — *Will — Trusts for Sale of Real Estate—Legal Estate—Renunciation of Probate by Trustee—Election to take as Real Estate.*] Devise and bequest of freehold and copyhold land and personal estate to *A.* and *B.*, upon trust as to the land for sale, and as to the personalty to realize the same, and to stand possessed of the proceeds upon trust for *C. M.*, who was his heir-at-law, absolutely. *A.* predeceased the testator; *B.* renounced probate, and died three years afterwards, not having acted as trustee, though he did not disclaim the trusts, and letters of administration with the will annexed were granted to *C. M.* From and after the testator's death *C. M.*, through his agent, received the rent of the land, but did not exercise any other act of ownership. No one was admitted tenant of the copyhold. The land was let from year to year, and there was one change of tenancy effected by the agent. On the death of *C. M.*, who survived the testator nearly nine years, the question arose whether the land was to be treated as real estate:—*Held*, that on *B.* renouncing probate, the legal estate devolved on *C. M.*, and that, whether the legal estate was outstanding or not, *C. M.* must be taken to have elected to take the land as real estate. *In re* GORDON. ROBERTS *v.* GORDON - - 531

2. —— *Devise of Real Estate—Direction to sell—Contingency—Election to take in Specie.*] A person contingently entitled to the proceeds of real estate directed to be sold may, pending the contingency, elect to take the estate as realty, and such election will become operative upon the contingency happening before or upon his death. MEEK *v.* DEVENISH - - - - 566

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COVENANT—*Church-building Contract—Contract Price—Trustees of Building Fund—Vicar and Incumbent — Covenant with Builder — Personal Covenant—Extras—Action against Vicar's Estates —Liability confined to Period of holding Office— Exhaustion of Fund — Covenant binding Fund only.*] A proviso which is in terms wholly repugnant to a covenant creating a personal liability is void; but a proviso only limiting the personal liability without destroying it is valid.—*Furnivall* v. *Coombes* (5 Man. & G. 736; 6 Scott, N. R. 522) explained.—By two contemporaneous building contracts made in 1868 between the Plaintiff, a builder, of the one part, and *C.*, vicar of the parish of *St. Pancras*, and *A.*, incumbent of an ecclesiastical district within the parish, of the other part; after reciting that, under an Act creating the district, *C.*, or the vicar for the time being of *St. Pancras*, in conjunction with *A.*, or

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COVENANT—*continued.*
the incumbent for the time being of the district, were to apply a fund, payable to them by a railway company, in building a church and parsonage for the district; it was witnessed that in consideration of sums amounting together to the whole of the available building fund, to be paid to the Plaintiff by *C.* and *A.*, "their executors or administrators, or the person or persons for the time being entitled to apply the said fund under the said Act," the Plaintiff agreed with *C.* and *A.*, "and with such person or persons as aforesaid," and *C.* and *A.*, "to the intent (so far as they lawfully could or might) to bind such person or persons as aforesaid, but not so as to bind either of themselves or his heirs, executors, or administrators, after he or they should have ceased to be entitled to apply the same fund, did and each of them did agree with the Plaintiff;" then followed provisions under which the Plaintiff was to build the church and parsonage in accordance with plans and specifications; and a clause stipulating that the consideration moneys should be paid in manner provided by the specifications. The specifications provided for monthly payments on account of the contracts; also that the architect might order additional works; and that payments for additional works were to be made on the completion of the entire works.—In June, 1869, *C.*, having obtained preferment, ceased to be vicar of *St. Pancras*, by which time the whole of the building fund had been exhausted. The buildings were completed in June, 1870. In February, 1875, *C.* died, whereupon the Plaintiff brought an action against his executors to recover a sum alleged to be due for "extras" under the contracts:—*Held* (1), that the liability of *C.* and *A.* respectively under the contracts was restricted to the period during which they were respectively vicar and incumbent, and therefore that *C.'s* liability terminated on his ceasing to be vicar; and (2) that in any case the liability of *C.* and *A.* extended only to the amount of the building fund, and no further. WILLIAMS *v.* HATHAWAY - - 544

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ELECTION—*Settlement and Will.*] A settlor, on the marriage of his daughter, covenanted that, immediately after his death, a share, which in the event became one-third, of all and singular his real and personal estate should be settled for the benefit of the daughter, her husband, and their children, in equal shares. One of the four children of the marriage, a daughter, died in the settlor's lifetime, leaving a husband, who also died in the settlor's lifetime, and two infant children, who survived the settlor.—The settlor made a will, whereby, after directing payment of his debts, he disposed of personal chattels, gave a number of legacies, and, amongst others, a legacy of £4500, and part of the residue of his estate, to his nephews and nieces, and his two infant great-grandchildren above mentioned, in equal shares:—*Held*, that the liability under the covenant was not a debt to be paid before the division of residue, and that the infants were bound to elect between the benefits under the settlement and under the will.—*Chichester* v. *Coventry* (Law Rep. 2 H. L. 71) distinguished. Bennett *v.* Houldsworth [671
—— Devise of land for sale—Election to take in specie - - - - 566
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EQUITABLE ASSETS—Earnings of married woman - - - - 739
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ESTATE TAIL—Restraint on barring - 318
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ESTOPPEL—Acknowledgment by tenant for life [1
See Will. 1.
EVIDENCE—*Bankruptcy Act*, 1869 (32 & 33 *Vict.* c. 71), *s.* 96—*Protection of Witness—Answers tending to criminate.*] A mere witness summoned for examination, under sect. 96 of the *Bankruptcy Act*, 1869, as to the property of a bankrupt, is entitled to refuse to answer a question on the ground that his answer would tend to criminate himself.—The bankrupt himself, however, being under a personal obligation to make a full disclosure of his property to his creditors, is not entitled to any such protection, but must answer all questions put to him about his property, whatever the consequences to himself may be. *Ex parte* Schofield. *In re* Fifth C. A. 230
—— Custom - - - - - 256
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—— Expert - - - - 415, n.
See Patent. 2.
EXAMINER—Office of—Right to exclude strangers - - - - - 109
See Practice. 15.
EXECUTION CREDITOR—Act of bankruptcy
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EXECUTOR—Donee of general power of appointment - - - - - 281
See Practice. 3.
—— Loss of assets - - - - 562
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FALSA DEMONSTRATIO—Enumeration of closes—Omission of two - - - 436
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FATHER—Right to be next friend - 19
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FEES—Counsel employed by witness - 328
See Practice. 23.
FIDUCIARY RELATION—Default—Attachment under Debtors Act - - 252
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—— Promoter of company - - - 371
See Company. 4.
—— Solicitor and client - - - 638
See Solicitor. 1.
FORECLOSURE—Jurisdiction of Court of Bankruptcy - - - - 335
See Bankruptcy. 5.
FRAUD—Charges of—Costs - - 82
See Company. 2.
—— Judgment—Appeal - - - 297
See Practice. 18.
FRAUDS, STATUTE OF—*Agreement for Lease—Specific Performance—Date—Commencement—Damages—Remoteness—Loss of expected Profits.*] A memorandum of agreement to grant a lease, not stating any time for the commencement of the lease, construed as an agreement for a lease to commence immediately from the date of the agreement, and held sufficient under the *Statute of Frauds*.—The Plaintiff agreed with the Defendant to take a lease of premises belonging to the Defendant for the purpose, as the Defendant knew, of carrying on a trade which the Plaintiff was about to commence. In consequence of the Defendant's wilful refusal to fulfil his agreement, the Plaintiff was unable for fifteen weeks to commence his trade:—*Held*, that, in addition to judgment for specific performance of the agreement, damages must be awarded in respect of the Plaintiff's loss of profits from his trade during

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FRAUDS, STATUTE OF—*continued.*

the fifteen weeks; and £250 damages were awarded. JAQUES *v.* MILLAR - - 153

2. —— *Agreement for Lease—Offer and Acceptance—Lessor not named—Specific Performance.*] An offer in writing to take a lease of a theatre, signed by the intending lessees and attested by the lessor's agent, but not naming the lessor and only addressed to him as "Sir," followed by an acceptance in writing by the agent, addressed to and received by the intending lessees, but likewise not naming the lessor, which letter was not signed by them nor referred to in any other writing:—*Held*, not to be an agreement in writing within the *Statute of Frauds* so as to entitle the lessor to have the same specifically performed. WILLIAMS *v.* JORDAN - 517

FRAUDULENT SETTLEMENT—13 *Eliz. c.* 5—*False Recital—Complicity of Wife—Jurisdiction—Relief against co-Defendant — Declaration of Future Interest—Costs of Husband and Wife joining in Defence in respect of her Separate Estate.*] *C.*, who carried on the business of a flax spinner at the *S.* mills in partnership with *R.*, by a settlement made in contemplation of his marriage, after reciting that he was indebted to his intended wife in a sum of £20,000, covenanted to pay the said sum of £20,000 to the trustees of the settlement, upon trust that as soon as he should become owner in fee simple of the *S.* mills estate, which he had agreed to purchase, they should advance the said sum of £20,000 to him on the security of the same estate; and it was declared that the trustees should stand possessed of the said sum of £20,000 and the securities for the same upon trust to pay the income to his intended wife for life for her separate use, and after her death to *C.* during his life or until he should become bankrupt, with remainder in trust for the children of the marriage, and in default of children, for his wife absolutely. The recital that *C.* was indebted to his intended wife was entirely false: and *C.* was at the time of the marriage in insolvent circumstances; but the wife had no knowledge of the insolvency of her husband, and understood nothing about the recitals or the arrangements as to the £20,000, except that that sum was to be settled. *C.* subsequently purchased the *S.* mills estate, and mortgaged it to the trustees of the settlement for securing £20,000, but no money actually passed between the parties. *C.*, and also his firm, afterwards became bankrupt, and a bill was filed by the trustee in *C.'s* bankruptcy against *C.* and his wife, the trustees of the settlement, and the trustee in the bankruptcy of the firm, praying that the settlement and the mortgage might be set aside as fraudulent against the creditors; and that the rights of all parties might be declared:—*Held* (affirming the decision of the Vice-Chancellor of the Duchy of *Lancaster*), that, notwithstanding the falsity of the recitals, the settlement and the mortgage deed were valid against the creditors so far as concerned the interests of the wife and children:—But *held* (varying the decree of the Vice-Chancellor), that it would be premature to decide any question as to the future life interest of *C.* contingent on his wife's death in his lifetime:—*Held*, also, that as the Plaintiff's case had entirely failed, the Court had

FRAUDULENT SETTLEMENT—*continued.*

no power to decide any question between the trustees of the settlement and their co-Defendant, the trustee in the bankruptcy of the firm.—The husband and wife having joined in their defence, the bill was dismissed against them both with costs.—*Wright* v. *Chard* (4 Drew. 702) distinguished. KEVAN *v.* CRAWFORD - C. A. 29

FUTURE RENT—Claim for winding up of company - - - - - 744
See COMPANY. 8.

GAS COMPANY—Distress by—Bankruptcy 63
See BANKRUPTCY. 6.

GIFT—Solicitor—Fiduciary relation - 633
See SOLICITOR. 1.

GUARANTEE — *Construction — Consideration — Married Woman—Separate Estate—Costs.*] The wife of a retail trader who was possessed of separate estate, in order to obtain credit for her husband from a wholesale merchant with whom he dealt, gave the latter a written guarantee as follows: "In consideration of you *M.* having at my request agreed to supply and furnish goods to *C.* (the husband), I do hereby guarantee to you *M.* the sum of £500. This guarantee is to continue in force for the period of six years and no longer": —*Held*, that the guarantee was not limited to the price of goods supplied to the husband after it was given, but that it extended to any sums, not exceeding £500, which were due from the husband to *M.* during the six years:—*Held*, also, that the agreement by *M.* to supply goods did not of itself form a sufficient consideration to support the guarantee unless goods were actually supplied after it was given, but that any subsequent supply of goods not paid for in cash at once was enough to support it, even though *M.* refused to supply them until additional collateral security had been given to him by the husband, or until the husband had promised to make a payment in reduction of the balance of his account:—*Held*, also, that the balance due from the husband to *M.* (not exceeding £500) was a charge on the wife's separate estate, and that *M.'s* costs of an action to enforce the charge must also be charged on that estate, and, if necessary, in addition to the £500. MORRELL *v.* COWAN - - - - 166

HEIR—Descent to—Disseisin - - 496
See WILL. 4.

HUSBAND AND WIFE—*Dower — Mortgage by Husband and Wife of Husband's Freehold Estate —Wife's Right to redeem—Principal and Surety.*] A wife married before the *Dower Act*, joined, for the purpose of releasing her dower, with her husband in mortgaging his freehold estate to secure his debt. By the mortgage deed the equity of redemption was reserved to the husband:—*Held*, that the wife's right to dower was extinguished in equity as well as at law, and that she had no right to redeem the estate:—*Held*, also, that, as she had pledged no estate recognised by a Court of Equity, and had undertaken no personal liability on behalf of her husband, she had no right in the character of a surety for his debt to have the value of her dower made good after his death out of the surplus proceeds of sale of the property

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HUSBAND AND WIFE—*continued.*
which had been during his life sold by the mortgagee under a power of sale contained in the mortgage deed.—Decision of *Bacon*, V.C., reversed.—*Jackson* v. *Parker* (Amb. 687) and *Jackson* v. *Innes* (1 Bli. 104) discussed and explained. DAWSON *v.* BANK OF WHITEHAVEN - C. A. 218

2. —— *Investment in Three Names—Advancement for Wife—Trustee.*] *A. B.* transferred certain railway debentures into the names of himself and his wife and a stranger who was one of the three trustees of his marriage settlement. He also transferred certain railway stock into the names of himself and his wife and two strangers, who were both trustees of the settlement:—*Held*, that the two investments were neither intended as an augmentation of the settlement fund, nor were they to form part of his residuary estate, but were advancements for the benefit of the wife; and the strangers in each case were trustees for her upon her surviving her husband. *In re* EYKYN'S TRUSTS [115

3. —— *Joint and Several Promissory Note by Husband and Wife—Bankruptcy of Husband—Separate Estate of Wife—Trustees not made Parties.*] A woman, married since the passing of the *Married Women's Property Act*, 1870, joined her husband in signing a joint and several promissory note for money lent to him. The husband became bankrupt:—*Held*, that her separate estate was liable for the amount due on the note, and that it was not necessary to make any trustees for the wife parties to the action. DAVIES *v.* JENKINS - - - - - 728

4. —— *Married Women's Property Act* (33 & 34 *Vict. c.* 93), *s.* 10—*Policy of Insurance—Form of Order—Declaration of Trusts.*] *W. M.*, deceased, in his lifetime effected a policy of insurance under the *Married Women's Property Act*, s. 10, for the benefit of his wife and children or child, but the interest they were to take was not expressed upon the face of the policy.—The Court, upon an application under the 10th section of the Act for the appointment of trustees to receive the moneys due under the policy, declared the rights and interests therein of the wife and children of the deceased, and directed the fund to be settled upon the usual trusts of a settlement. *In re* MELLOR'S POLICY TRUSTS - - - 127

5. —— *Married Women's Property Act*, 1870 (33 & 34 *Vict. c.* 93)—*Deceased Married Woman—Earnings—Equitable Assets.*] The separate estate of a married woman in earnings, under the *Married Women's Property Act*, 1870, becomes upon her death equitable assets and divisible amongst her creditors *pari passu*, so that her executor has no right to retain in full his own debt thereout. *In re* POOLE'S ESTATE. THOMPSON *v.* BENNETT - - - - - 739

—— Costs—Joint defence - - - 29
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—— Guarantee by wife—Separate estate - 166
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—— Postnuptial settlement - - 87
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—— Settlement - - - 618, 686
See SETTLEMENT. 1, 2.

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—— Wife's real estate—Partition - - 553
See PARTITION.

IMMATERIAL VARIATIONS - 415, n.
See PATENT. 2.

INFANT—Debt to—Debtor's summons - 358
See BANKRUPTCY. 2.

—— Next friend - - - - 19
See PRACTICE. 16.

—— Real estate—Purchase by railway company
See LANDS CLAUSES ACT. 1. [491

INFERENCE—Supplying omission in will 133
See WILL. 7.

INJUNCTION—Criminal proceedings - 463
See PUBLIC HEALTH ACT.

—— Injury to reputation - - - 582
See PRACTICE. 17.

—— Light and air - - - 160, 757
See LIGHT AND AIR. 1, 2.

—— Rifle practice - - - - 521
See DEFENCE ACT.

—— Trade-mark - - - - 770
See TRADE-MARK.

INSURANCE—Life—Premiums paid by trustees—Proof—Bankruptcy - - 790
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INTENTION—Test—Partnership—Participation in profits - - - - 303
See PARTNERSHIP. 2.

INTEREST—Shareholder—Payment of debts of company - - - - 447
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INVESTMENT—In three names - - 115
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—— Chancery Division—Probate Division—Probate of will - - - - 98
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—— Injunction—False statements - - 582
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LANDLORD AND TENANT—Company—Winding up—Claim - - - - 744
See COMPANY. 8.

LANDS CLAUSES ACT, 1845, *s.* 69—*Railway Company—Purchase of Infant's Real Estate—Purchase-money—Constructive Reconversion into Realty.*] Purchase-money paid into Court by a railway company under sect. 69 of the *Lands Clauses Consolidation Act*, 1845, for land of which an infant is absolutely seised in fee, remains impressed with

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LANDS CLAUSES ACT, 1845—*continued.*
the character of real estate, and on the death of the infant descends to his heir-at-law.—The word "settled" in sect. 69 means simply "standing limited." KELLAND *v.* FULFORD - - 491

2. —— *ss.* 69, 75, 76, 77, 79—*Railway Company—Taking of Land—Compulsory Powers—Trespasser—Title by Possession—Payment of Purchase-money into Court—Statute of Limitations.*] A railway company agreed to purchase for £600 the fee simple of lands, of which *W.* was the true owner, from *H.*, who was in possession of them. Afterwards finding that *H.* had only a possessory title of 19½ years, they paid the £600 into Court to the account of "the party interested" therein, took possession, and executed a deed-poll under the 77th section of the *Lands Clauses Consolidation Act*, 1845, reciting their desire that the land should vest in them for all the estate of *H.*, and purporting to vest in themselves the fee simple of the lands. No claim was made on behalf of *W.* either to the land or the purchase-money until after the expiration of twenty years from the time when *H.* had taken possession. Upon petition by persons claiming under *H.* for payment out to them of the £600 in Court:—*Held*, as against the representative of *W.*, that the Petitioners were entitled to the £600, as being the money which the company had contracted to pay for the purchase of *H.'s* interest in the lands. *Ex parte* WINDER - - 696

LARGENESS OF CLAIM—Patent - - 412
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LEASE—Agreement for—Statute of Frauds
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—— Premium on granting—Mortmain - 597
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LEASEHOLDS—Renewable—Purchase of reversion - - - - - 706
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LEGAL ESTATE—Devise of—Renunciation of probate - - - - 531
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LETTERS—Solicitor—Right to retain letters of client - - - - 97
See SOLICITOR. 2.

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—— Vicar of parish—Building—Contract for building church - - - 544
See COVENANT. 2.

LIEN—Solicitor - - - - 105
See SOLICITOR. 3.

—— Solicitor—Costs - - - 553
See PRACTICE. 8.

—— Wharfinger—Goods marked with spurious trade-mark - - - - 770
See TRADE-MARK.

LIFE INSURANCE—Married Women's Property Act - - - - - 127
See HUSBAND AND WIFE. 4.

LIGHT AND AIR—*Alteration of Plane of Window—Alteration of Shape—Small Injury—Damages or Injunction*—2 & 3 *Will.* 4, *c.* 71, *s.* 3.] A building containing ancient lights was pulled down and replaced by another, in which the front was set back and a dormer window converted into a skylight:—*Held*, that the right to access of light was not lost.—*Per Jessel*, M.R. (on motion for injunction): Any substantial alteration in the plane of the windows destroys the right.—*Per Fry*, J.: The right remains where any portion of the light which would have passed over the servient tenement through the old windows passes also through the new windows.—Considerations on which the question of injunction or damages depends discussed. NATIONAL PROVINCIAL PLATE GLASS INSURANCE COMPANY *v.* PRUDENTIAL ASSURANCE COMPANY - - - - - 757

2. —— *Injunction—Inquiry as to Damages—Trivial Injury—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66)—*Lord Cairns' Act* (21 & 22 *Vict. c.* 27).] Since the *Judicature Act*, as before it, a Plaintiff in an action to restrain an alleged obstruction to ancient lights cannot obtain an injunction unless he proves substantial damage.—An inquiry as to damages will not be directed where the Plaintiff has opened a case of substantial damage and has failed to prove it. KINO *v.* RUDKIN - 160

LIMITATIONS, STATUTE OF—*Coal Mine—Covenant to get Coal for Sale—Trespasser—Adverse Possession of Mines—Accounts—Allowances.*] The Plaintiffs were seised in fee of lands to which their predecessors derived title under a conveyance in the reign of Queen *Elizabeth*, wherein the grantor reserved to himself and his heirs male a rent-charge of 7*s.* 8*d.*, and which contained a proviso that the grantee and his heirs should not dig or get any coal upon the lands for sale, but only such as should be burned or employed thereon.—The Defendant claiming title under a demise from a descendant of the same grantor, had for more than twenty years worked from mines of his own under adjacent lands, into, and had taken coals from, the mines under the Plaintiffs' lands:—*Held*, first, that the proviso in the original conveyance was a covenant, and not a repugnant condition, and that it did not affect the amount of damages which the Plaintiffs were entitled to claim, as, under it, the grantee was still entitled to get all the coal, for his own use, though not to sell it; secondly, that the Defendant had not acquired any title to the mine by possession under the *Statute of Limitations*, and that the Plaintiffs were entitled to an injunction with an account for six years; and thirdly, that, as the Defendant had been working under a *bonâ fide* belief as to his title, he was entitled, in taking the account, to an allowance of his expenses of severing the coal as well as bringing it to bank. ASHTON *v.* STOCK [719

2. —— *Estate Tail—Restraint on barring—Recovery—3 & 4 Will. 4, c. 27—Demurrer—Allegation of Fact.*] A testator, who died in 1782, devised lands to his son *R. P.* and the heirs of his body, but upon special trust and confidence in his said son that in case he should have no issue of his own body he would not do or suffer any act in law or otherwise to obstruct or prevent the subsequent devises and limitations of the estate from taking effect, but, on the contrary, would do, or cause to be done, every act in his power to establish and confirm the same; and if *R. P.* should

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MITATIONS, STATUTE OF—*continued.*

happen to die leaving no issue, then the testator gave the estate over upon trusts under which the Plaintiff's grandfather was second tenant for life with remainder to his sons successively in tail male. The Plaintiff commenced this action in 1877, and by his statement of claim alleged that *R. P.* died without issue in 1808; that the next tenant for life died without issue in 1840, whereupon the Plaintiff's grandfather became entitled in possession as tenant for life; that the grandfather died in 1852, leaving his eldest son, the Plaintiff's father, who thereupon became entitled as tenant in tail in possession; and that the Plaintiff's father died in 1864, leaving the Plaintiff his eldest son. That the Defendant had been in possession ever since 1840, and claimed to be entitled to such possession under the will of *R. P.*, whom the Defendant alleged to have acquired the fee simple under a common recovery suffered by him in 1782. The Plaintiff submitted that any such recovery was invalid, if not at law, at all events in equity, and claimed to recover the estate. The Defendant demurred on the ground that the recovery was good and gave *R. P.* the fee simple; and also *ore tenus*, on the ground of the *Statute of Limitations*, and the demurrer was allowed by *Malins*, V.C.:—*Held*, on appeal, that the directions in the will purporting to restrain *R. P.* from barring the remainders expectant on his estate tail were ineffectual, and could not prevent his acquiring the fee simple by a common recovery:—*Held*, however, that technically the demurrer on this ground would not hold, for that the statement of claim did not sufficiently allege as a fact that a common recovery had been suffered:—But *held*, that inasmuch as the *Statute of Limitations* (3 & 4 Will. 4, c. 27) does not merely bar the right to recover land, but takes away the title to the land, it may be raised by demurrer; and that as the statement of claim distinctly shewed that the estate tail, in respect of which the Plaintiff claimed, had come into possession more than twenty years ago, and that the Defendant had been in possession during the whole of that period, and contained no allegation of any circumstance bringing the case within any of the savings in the statute, the demurrer had been rightly allowed. DAWKINS *v.* LORD PENRHYN - - C. A. 318

—— Title by possession - - - 696
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MEETING OF DEBENTURE HOLDERS - 627
See COMPANY. 5.

MEETING OF SHAREHOLDERS—Rejection of votes - - - - - 70
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METROPOLIS MANAGEMENT ACT — *"New Street"—Cost of Paving—Improper Charge on General Rate—Order to recoup—Liability of Owners of adjoining Houses and Land—Jurisdiction—Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 105—*Metropolis Local Management Acts Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77.] Where within the metropolis a road has become a "new street" within the *Metropolis Management Act*, 1855 (18 & 19 Vict. c. 120), s. 105, and the district board has improperly charged the cost of paving the footpath of such new street upon the general rate of the parish in which it is situated, the Court will order the district board to restore to the general rate the amount so expended, and to levy the same upon the owners of the adjoining houses and land, as provided by the said section as varied by sect. 77 of the *Metropolis Management Amendment Act*, 1862 (25 & 26 Vict. c. 102). ATTORNEY-GENERAL *v.* WANDSWORTH DISTRICT BOARD OF WORKS 539

MILITARY PURPOSES—Land held for - 591
See DEFENCE ACT.

MINE—*Water—Use of Property—Water discharged into neighbouring Mine—Negligence—Ordinary Course of Working—Damages—Injunction.*] The owner of a mine, who by means of a pit or shaft intercepts water which previously flowed in unascertained underground channels, is not entitled by any means not in the ordinary and proper course of working his mine to cast the water thus intercepted upon the land of his neighbour, even though, if the water had not been thus intercepted, it would have flowed naturally upon that neighbour's land.—By intercepting the water the person who digs the pit or shaft makes the water his own property, and must take the burden as well as the benefit of it. And if he afterwards casts it wrongfully on his neighbour's land, he will be liable for the damage thus done to him. WEST CUMBERLAND IRON AND STEEL COMPANY *v.* KENYON [773

—— Covenant not to dig—Statute of Limitations
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—— Will - - - - 133, 436, 591
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MORTGAGE—*Bankruptcy of Mortgagor—Trustee in Liquidation—Giving up of Security and Proof of Debt by prior Mortgagee—Rights of subsequent Mortgagees—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71, *s.* 6, 16, 17, 40)—*Bankruptcy Rules*, 1870, *rr.* 99, 100, 134, 136, 272.] Proof in the liquidation of the estate of a mortgagor under the *Bankruptcy Act*, 1869, by a first mortgagee, for his whole debt, and giving up the security to the trustee, put the trustee, under the operation of the statute, in the place of the first mortgagee, and do not accelerate the rights of subsequent mortgagees. CRACKNALL *v.* JANSON - - - - 735

2. —— *Mortgagee in Possession—Taking Possession of Part—Wilful Default—Farm—Shooting—Woods.*] The mortgagees of land, consisting of copses and of a farm which was let without the

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MORTGAGE—*continued.*
shooting or the timber, gave notice to the tenant of the farm to pay the rent to the mortgagees, and afterwards moved to restrain the mortgagors from cutting the timber:—*Held*, that though the mortgagees had become mortgagees in possession of the farm, they had not become mortgagees in possession of the shooting, the copses, or the timber, so as to be liable to account for default. SIMMINS *v.* SHIRLEY - - - - - - - 173
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PARTIES—Action to restrain rifle practice 521
See DEFENCE ACT.
PARTITION—*Action for—Married Woman's Real Estate—Sale—Purchase-money—Reconversion—Partition Act*, 1868, *s.* 8.] By the decree in a partition suit a sale was directed of certain real estate, of which seven-eighths belonged to the Plaintiff and one-eighth to the Defendant, Mrs. *Q.*, a married woman, in fee. The Plaintiff having subsequently offered to purchase Mrs. *Q.*'s share, an order was made in Chambers, on the application of all parties, directing that, Mr. and Mrs. *Q.* accepting £1200 as the purchase-money for Mrs. *Q.*'s one-eighth, the Plaintiff should pay the amount into Court, which he did; but before any conveyance was executed Mrs. *Q.* died, leaving two infant daughters her co-heiresses. Mr. *Q.* took out administration to her estate:—*Held* (applying the principle in *Foster* v. *Foster* (1 Ch. D. 588)), that the £1200 must be treated as realty by force of sect. 8 of the *Partition Act*, 1868, incorporating sects. 23 to 25 of the *Leases and Sales of Settled Estates Act*, and therefore belonged to the co-heiresses, subject to Mr. *Q.*'s life interest as tenant by curtesy. MILDMAY *v.* QUICKE - 553
PARTNERSHIP—*Proof by Partner—Joint Estate—Ostensible Partner—Holding out as Partner to a small Number of Creditors.*] A person, who was alleged to have held himself out as a partner with a trader to three of his creditors, claimed to prove a debt in the trader's separate liquidation. Two of the three creditors had also proved in that liquidation. The third was fully secured, but had taken no proceedings against the *quasi* partner:—*Held* (affirming the decision of *Bacon*, C.J.), that the *quasi* partner was entitled to prove.—*Per James*, L.J.: A person who has held himself out as a partner with a trader to a small number of the creditors of the latter, is not thereby precluded from proving in the separate bankruptcy of the trader—his estate being insufficient to leave a surplus—for the debt due to him from the trader. *Ex parte* SHEEN. *In re* WRIGHT C. A. 235
2. —— *Participation in Profits—Interest in Profits by way of Security—Test of Partnership—Intention.*] A father, whose son was about to become a member of *Lloyd's* and to commence the business of an underwriter, became security for him, in compliance with the rules of *Lloyd's*, to the amount of £10,000. The son executed a written agreement, which contained a recital of the security given by the father, and by which the son covenanted with the father (*inter alia*) that *S.*, and no other person, should underwrite at *Lloyd's* in the name of the son; that *S.* should be paid £200 a year and one-fifth of the net profits of underwriting; that the father should be at liberty to withdraw the whole of his security on notice being given to the son and other necessary parties, and immediately after such notice *S.*

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PARTNERSHIP—*continued.*
should cease to underwrite for the son or in his name; and that half the net profits of underwriting, deducting the share of *S.*, should, together with £25 per annum, be considered as owing and should be paid to the father by the son. The business was carried on in the son's name alone, the creditors not knowing that the father was in any way connected with it:—*Held*, that no partnership was constituted between the father and the son.—Participation in profits is not conclusive evidence of the existence of a partnership. It is very cogent evidence, and, if it stands alone, may be conclusive evidence of a partnership. But the effect of participation in profits may be outweighed by other circumstances.—*Pooley* v. *Driver* (5 Ch. D. 474) discussed. *Ex parte* Tennant. *In re* Howard [C. A. 303

PASTURE—Right of - - - - 500
See Right of Common.

PATENT—*Novelty—Prior Publication—Book in Public Library—Specification—Subsidiary Claim not novel.*] In order to invalidate a patent by prior book-publication, it is not enough to shew that the invention was described in a published book, but it must also appear that it became known to a sufficient part of the public.—Where a specification contains separate claims of two inventions, of which the second is to be used only in connection with and as subsidiary to the first, want of novelty in the second claim does not invalidate the patent.—In 1865 a patent for improvement in the construction of skates was granted to the agent of the inventor, who was a resident in *America*, and to whom the patent was afterwards assigned. Two years previously an American book containing a brief description of the invention (but not sufficiently particular to enable persons to manufacture the skates), and five weeks previously an American book of illustrations containing a drawing of the invention, were sent to the library of the Patent Office in *London*. This book of illustrations was not entered in the book of donations or in the catalogue, but it was placed on a bookshelf in a room open to the public, and was seen there by a librarian before the Plaintiff's patent was taken out:—*Held* (affirming the decision of the Master of the Rolls), that there was no prior publication of the patent in this country.—The patentee claimed, first, a mode of applying rollers and runners to the footstand of skates so that they might be cramped or turned so as to cause the skate to run in a curved line by the canting or tilting of the footstand; and secondly, the mode of securing the runners and making them reversible, as above described:—*Held*, that, assuming that there was nothing novel in the mode of securing the runners to the footstand, yet that the want of novelty in the second claim did not invalidate the patent, because the second claim must be read as claiming a subsidiary invention to be used only in connection with the principal invention. Plimpton v. Spiller - - - - C. A. 412

2. —— *Infringement—Immaterial Variations—Mechanical Equivalents—Evidence of Experts.*] In determining whether a Defendant has infringed the Plaintiff's patent, the Court will regard the substance of the invention; and if the Defendant has infringed the substance of the invention, although he may have made immaterial variations, or used mechanical equivalents, an injunction will be granted.—Observations on the value of the evidence of experts. Thorn v. Worthing Skating Rink Company - - - 415, n.

PAVING—Cost of - - - - 539
See Metropolis Management Act.

PENALTY—Public Health Act - - 463
See Public Health Act.

PETITION—Confirmation of Sales Act - 104
See Confirmation of Sales Act.

—— Winding-up - - - 102, 477
See Company. 6, 13.

PLEADING—Counter-claim - - 748, 753
See Practice. 9, 10.

—— Demurrer — Statute of Limitations — Recovery - - - - 318
See Limitations, Statute of. 2.

—— Uncertainty - - - - 500
See Right of Common.

POLICY OF INSURANCE — Married Women's Property Act - - - 127
See Husband and Wife. 4.

—— Payment of premiums by trustees—Proof in bankruptcy - - - - 790
See Bankruptcy. 7.

POSSESSION—Goods—Carrier - - 783
See Sale of Goods.

—— Mortgagee—Timber - - - 173
See Mortgage. 2.

—— Title by - - - - - 696
See Lands Clauses Act. 2.

—— Wrongful—Disseisin - - - 496
See Will. 4.

POSTNUPTIAL SETTLEMENT - - 87
See Voluntary Settlement. 2.

PRACTICE — *Amendment — Adding Parties—Assignment pendente lite — Rules of Court*, 1875, *Order xvi. r.* 13—*Trial—Order of Speeches of Counsel.*] Order made at the trial to add as a co-Defendant a person to whom the Defendant had assigned his interest *pendente lite*.—The order in which the speeches of counsel on the trial of an action with witnesses are to be made, prescribed. Kino v. Rudkin - - - - 160

2. —— *Amendment—Mistake—Rules of Court*, 1875, *Order xvi., r.* 2.] "*Bonâ fide* mistake" in Order xvi., r. 2, of the Rules of Court, 1875, includes a mistake of law as well as of fact. Duckett v. Gover - - - - - 82

3. —— *Appeal for Costs—Trustees—Judicature Act*, 1873, *s.* 49—*Rules of Court*, 1875, *Order lv.—Right of Executor of Donee of General Power of Appointment to receive the appointed Fund.*] A married woman having, under a settlement, a general power of appointment by will over a fund of personal estate, made a will directing that the fund should be divided among five persons, and appointed executors. The trustees of the settlement paid the fund into Court under the *Trustees Relief Act*, and the *cestuis que trust* presented a petition for payment out, and established their title by evidence. *Malins*, V.C.,

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PRACTICE—*continued.*

ordered payment of the fund to the Petitioners, but directed the trustees to pay the costs of the petition (except the costs of the evidence of title), on the ground that they ought to have paid the fund to the executor to be distributed. The trustees appealed from so much of this order as directed them to pay costs:—*Held*, that the case was governed by *Taylor* v. *Dowden* (Law Rep. 4 Ch. 697), and that an appeal would not lie.—*Per Jessel*, M.R., and *James*, L.J.: The law is now settled that where a *feme covert* or other donee of a general power of appointment over a fund of personalty makes an appointment of the fund by will and appoints an executor, the executor is entitled to receive the appointed fund. *In re* HOSKIN'S TRUSTS - - - C. A. 281

4. —— *Appeal from Order made in Chambers—Certificate of Judge.*] An order made by a Judge of the Chancery Division personally in Chambers may be appealed from equally with an order made by him in Court.—As a general rule, however, a certificate should be obtained from the Judge that he does not desire to hear any further argument in Court. But the object of such a certificate is only to satisfy the Court of Appeal that the Judge has judicially determined the matter, and, if otherwise satisfied of that fact, the Court of Appeal will hear the appeal without a certificate if the Judge declines to give one. Application should, in such a case, be made to the Court of Appeal for leave to set down the appeal without the Judge's certificate. *In re* ELSOM. THOMAS *v.* ELSOM - - C. A. 346

5. —— *Appeal—Rehearing—Order by County Court as auxiliary to London Court—Mutual Credit Clause—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 39, 71, 74.] The Chief Judge in Bankruptcy has power to review an order made by a County Court, under sect. 74 of the *Bankruptcy Act*, 1869, as auxiliary to the *London* Court. —*Per Bacon*, C.J.: The operation of sect. 39 of the *Bankruptcy Act*, 1869, cannot be excluded by agreement. *Ex parte* FLETCHER. *In re* VAUGHAN [C. A. 350

6. —— *Charging Order—Debitum in præsenti solvendum in futuro.*] Upon judgment in an action declaring that the Defendant is liable to pay to the Plaintiff a certain sum, and decreeing payment to be made on or before that day three months, the Plaintiff is at once entitled, under 1 & 2 Vict. c. 110, s. 14, to obtain a charging order upon stock and shares standing in the name of the Defendant. BAGNALL *v.* CARLTON - 130

7. —— *Charging Order*—1 & 2 *Vict. c.* 110, *ss.* 14, 18; 3 & 4 *Vict. c.* 82, *s.* 1—*Rules of Court*, 1875, *Order XLVI., r.* 1—*Stop Order.*] A decree was made in the suit of *W.* v. *T.*, declaring the Plaintiffs entitled to one-fifth share of the proceeds of the sale of certain personal property which had been received by the Defendants, and directing an account of what was due to the Plaintiffs, and ordering the Defendants to pay to them what should be found due, together with the costs of the suit. Part of the proceeds of the sale had been previously paid into Court in another suit of *H.* v. *T.* against the same Defendants, and by a decree in that suit had been ordered to be paid to the Defendants. As soon as the decree in

PRACTICE—*continued.*

W. v. *T.* had been pronounced, and before it was drawn up, the Plaintiffs obtained an order *ex parte* for a charging order *nisi* against the Defendants charging the fund in Court in *H.* v. *T.*, and for a stop order in the meantime:—*Held*, by the Court of Appeal, on the Defendants shewing cause against the order, first, that the specific sum due to the Plaintiffs not being ascertained, nor the costs taxed, the charging order was irregular, and must be discharged:—Secondly, that the Court could not grant a stop order until the Plaintiffs, by some independent proceedings, had established their right to attach the fund in Court in the suit of *H.* v. *T.*—*Burns* v. *Irving* (3 Ch. D. 291) not followed. WIDGERY *v.* TEPPER. HALL *v.* TEPPER [C. A. 364

8. —— *Charging Order—Costs—Stop Order—Solicitor's Lien on Fund—23 & 24 Vict. c.* 127, *s.* 28.] The solicitors of a married woman obtained a charging order on the fund for their costs in the action under the *Attorneys and Solicitors Act*, 1860, s. 28, and afterwards a stop order. Having been served with proposed minutes of order on further consideration, they appeared by counsel and asked for their costs of obtaining the stop order and of their appearance:—*Held*, that they must bear their own costs of obtaining the stop order and of their appearance. MILDMAY *v.* QUICKE - 553

9. —— *Counter-claim—Judicature Act*, 1873, *s.* 24, *sub-s.* 3—*Rules of Court*, 1875, *Orders XIX., r.* 3; *XXII., rr.* 5, 9; *XXVII., r.* 1.] A counter-claim must claim relief against the Plaintiff, and he must be made a party to it. The relief claimed by a counter-claim must relate to the specific subject-matter of the action.—Where a counter-claim sought indemnity:—*Held*, that the indemnity must be confined to the specific property which was the subject of the action.—*Shephard* v. *Beane* (2 Ch. D. 223) observed upon. HARRIS *v.* GAMBLE - - - - - 748

10. —— *Counter-claim—Pleading—Specific Statement of Facts relied on—Rules of Court*, 1875, *Order XIX., rr.* 3, 4, 10—*Forms* (*Appendix C*), *Nos.* 10, 14, 24.] A counter-claim must contain in itself a specific statement of the facts upon which reliance is placed for the relief claimed.—It is not sufficient that the facts relied upon appear in the statement of defence, even though that and the counter-claim form one continuous document.—A counter-claim defective in this respect was dismissed with costs, leave to amend being, under the circumstances of the case, refused. CROWE *v.* BARNICOT - - - - - - 753

11. —— *Discovery—Irrelevancy—Rules of Court*, 1875, *Order XXXI., r.* 19—*Evidence of Custom.*] In an administration action a horse-dealer brought a claim against the estate of the testator for charges connected with the purchase and sale of horses for the testator, and for the standing of horses at livery, for several years. The executrix disputed the amount charged, and alleged that the horsedealer had sold several horses, as agent for the testator, on commission, and asked for discovery of entries in the horse-dealer's books relating to the sales. The horse-dealer alleged that he had never sold horses on commission as agent for the testator, but on the terms that he should pay the testator a fixed sum

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PRACTICE—*continued.*

for each horse and sell it again on his own account for what he pleased, retaining the difference, if any, by way of profit; and that this was the custom of all horsedealers of good standing. And he declined to disclose the prices at which he had sold the horses as being irrelevant to the issue, namely, what the agreement or course of dealing between himself and the testator was:—*Held* (reversing the decision of *Hall*, V.C.), that the discovery was irrelevant to the issue; and the Court, in exercise of its discretion under Rules of Court, 1875, Order XXXI., rule 19, refused to order discovery to be made except as to the dates of the sales.—Evidence of the course of dealing of other horsedealers admitted to shew that the alleged agreement with the testator was not an unreasonable one. *In re* LEIGH'S ESTATE. ROWCLIFFE *v.* LEIGH - - - - - - **C. A. 256**

12. —— *Discovery—Redemption Suit—First and Second Mortgagees—Interrogatories—Particulars of Property.*] In a redemption suit by a second mortgagee against the first mortgagee the Defendant is bound to state in answer to interrogatories not only the amount due upon his security, but also what securities he holds for his debt. WEST OF ENGLAND AND SOUTH WALES BANK *v.* NICKOLLS - - - - - - **613**

13. —— *District Registry — Judicature Act*, 1873, *s.* 64—*Rules of Court*, 1875, *Order* XXXV., *rr.* 1, 1*a* — *Chancery Action — Trial before the Judge in London—Powers of District Registrars.*] Notwithstanding Rules of Court, 1875, Order XXXV., rule 1*a*, Chancery actions commenced in District Registries ought to be tried in *London* before the Judge of the Chancery Division to whom they have been assigned.—District Registrars have no power to appoint receivers, direct banking accounts to be opened, and money to be paid in to those accounts; nor have they any power to take accounts directed by the Judge in actions commenced in the District Registries, unless the judgment specially directs them so to do. *In re* SMITH (DECEASED). HUTCHINSON *v.* WARD **[692**

14. —— *District Registry — Administration Action in—Taxation of Costs.*] The Court will not, except under very special circumstances, direct the costs of an action commenced in a district registry to be taxed otherwise than by the Taxing Master in *London*. DAY *v.* WHITTAKER **[734**

15. —— *Examiner's Office—Right to exclude Agent of Parties*—15 & 16 *Vict. c.* 86, *s.* 31.] The office of the examiner of the Court is not a public Court, and if the presence of the public is objected to the examiner has no discretion to admit them. —Where a clerk on commission of parties under examination before the examiner of the Court was himself interested in the case, and was to be subsequently called as a witness:—*Held*, that he was not entitled to be present under 15 & 16 Vict. c. 86, s. 31, and that he ought properly to be excluded from the office. *In re* WESTERN OF CANADA OIL, LANDS, AND WORKS COMPANY - - **109**

16. —— *Infant Plaintiffs — Next Friend — Right of Father to be Next Friend.*] A testator gave life annuities to his six nephews and nieces, and directed the residue, which was of large amount, to be accumulated for twenty-one years, and then to be divided among such of the six as should be then living, with a proviso substituting the issue of any who died within that period for their parents. A person nominated by the executors commenced an action against the executors for administration of the estate, as next friend of the infant children of one of the nephews, and at once obtained a decree. The father of the infants, who had no adverse interest to them, and against whom there was no imputation, appeared to have been informed that a suit was pending for the administration of the estate, but was not aware that his children were the Plaintiffs until after the decree had been made. He then applied to be substituted as next friend. *Little*, V.C., refused the application, on the ground that there was no authority laying down that where a suit is about to be instituted on behalf of infants a communication must be made to their father:—*Held*, on appeal, that the father ought to be substituted as next friend. WOOLF *v.* PEMBERTON **C. A. 19**

17. —— *Injunction — Advertisement — False Statement—Injury to Trade—Judicature Act*, 1873, *s.* 25, *sub-s.* 8.] Upon motion for an injunction to restrain the issuing of an advertisement containing false representations calculated to injure the Plaintiff's trade,—The Court was of opinion that notwithstanding the decision in *Prudential Assurance Company* v. *Knott* (Law Rep. 10 Ch. 142), it now had power by the *Judicature Act*, s. 25, sub-s. 8, to restrain the publication of such an advertisement, but declined to do so upon an interlocutory application. THORLEY'S CATTLE FOOD COMPANY *v.* MASSAM - - - **582**

18. —— *Judgment obtained by Fraud—Appeal.*] The Plaintiffs commenced an action to restrain the Defendants from infringing their patent, and obtained a judgment which was reversed by the Court of Appeal, who dismissed the action on the ground that the Defendants' process was no infringement of the Plaintiffs' patent. After the order on appeal was passed and entered, the Plaintiffs applied to have the appeal reheard with fresh evidence, on the ground that when an expert sent down by the Court, and whose evidence was in fact the only material evidence before the Court as to the nature of the Defendants' process, examined the Defendants' works, the Defendants had fraudulently concealed from him parts of the process, so that he had no opportunity of discovering the points in which it resembled that of the Plaintiffs:—*Held*, that the Court of Appeal had no jurisdiction to rehear the appeal, and that the remedy of the Plaintiffs was by original action analogous to a suit under the old practice to set aside a decree as obtained by fraud. FLOWER *v.* LLOYD - - **C. A. 297**

19. —— *Mandamus — Winding-up — Judicature Act*, 1873, *ss.* 16; 24, *sub-s.* 7; 25, *sub-s.* 8; 34; 100—*Judicature Act*, 1875, *s.* 11, *sub-ss.* 1, 2 — *Rules of Court*, 1875, *Order* LII., *r.* 4.] A Judge of the Chancery Division of the High Court of Justice has jurisdiction to direct the issue of a mandamus in every cause or matter pending before him. *In re* PARIS SKATING RINK COMPANY **[731**

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PRACTICE—*continued.*

20. —— *Motion for Judgment—Rules of Court*, 1875, *Orders* XIII., *r.* 9; XIX., *r.* 6; XXIX., *r.* 10; *and* XL., *r.* 11—*Co-Defendant served, but not appearing.*] Where one of several Defendants served has not appeared, while the others have appeared and delivered defences, the Plaintiff may move for judgment, as against the Defendants who have delivered defences, under Rules of Court, 1875, Order XL., r. 11, upon admissions, and as against the defaulting Defendant under the combined effect of Orders XIII., r. 9, and XXIX., r. 10; but as against the latter the action must be set down on motion for judgment, and in both cases two clear days' notice of motion must be given. PARSONS *v.* HARRIS - - **694**

21. —— *Sale under Direction of the Court—District Registry—Judicature Act*, 1873, *ss.* 62, 66—*Rules of Court*, 1875, *Order* XXXV., *rr.* 1, 2, 4.] Where a decree in an administration action directed the accounts to be taken in a District Registry, and the real estate to be sold with the approbation of the Judge, Vice-Chancellor *Hall* directed that the sale should take place in his Chambers:—*Held*, by the Court of Appeal, that although it might have been more convenient that the sale should take place in the District Registry, yet the place and manner of the sale was a matter entirely within the discretion of the Judge, and refused to interfere with his exercise of such discretion. MACDONALD *v.* FOSTER **C. A. 193**

22. —— *Trial by Jury—Action in Chancery Division—Order for sending Action for Trial at Assizes—Sufficient Reason—Rules of Court*, 1875, *Order* XXXVI., *rr.* 3, 8—*Rules of Court, December*, 1876, *Order* XXXVI., *r.* 29*a*.] On an application by the Plaintiffs, with the concurrence of the Defendant, in an action in the Chancery Division for an order that the action might be tried at the *Staffordshire* Assizes:—*Held*, having regard to Rules of Court, 1875, Order XXXVI., rules 3, 8, and Rules of Court, December, 1876, Order XXXVI., rule 29*a*, that an action as well as a question or issue therein might be ordered to be tried before the Commissioners of Assize; that, inasmuch as the parties desired it, as the action was for damages only, as it related to property in *Staffordshire*, and as there were a great many local witnesses, the order asked for should be made, and the above reasons stated on the face of the order as the reasons for which it was expedient that the action should be so tried.—*Semble*, the wish of the parties would not alone be a sufficient reason for making such an order.—*West* v. *White* (4 Ch. D. 631) considered. WOOD AND IVERY, LIMITED, *v.* HAMBLET - - - **113**

23. —— *Witness—Expenses—Costs—Fees to Counsel—Bankruptcy Act*, 1869 (32 *&* 33 *Vict. c.* 71), *s.* 96—*Bankruptcy Rules*, 1870, *rr.* 170, 186.] A mere witness summoned for examination under sect. 96 of the *Bankruptcy Act*, 1869, is not entitled to the costs of employing a solicitor or counsel.—The managing director of a company in which a liquidating debtor had held some shares, which had been forfeited, was summoned by the trustee in the liquidation under sect. 96 for examination, with the view of obtaining information for the purpose of impeaching the validity of the forfeiture. He attended at the time appointed, and two counsel were present on his behalf, but, as the trustee's counsel did not attend, the examination was adjourned *sine die*, with costs to be paid by the trustee.—*Held* (reversing the decision of the Registrar), that the witness was only entitled to the ordinary allowance for his expenses, and not to the costs of his solicitor or the fees paid to his counsel. *Ex parte* WADDELL. *In re* LUTSCHER - **C. A. 328**

—— Confirmation of Sales Act - - **104**
See CONFIRMATION OF SALES ACT.

—— Winding-up - - - **102, 112**
See COMPANY. 12, 13.

PREFERENCE SHARES - - - **511**
See COMPANY. 7.

PREFERENTIAL DEBT — Bankruptcy — Gas company - - - - **63**
See BANKRUPTCY. 6.

PREMIUM—Granting lease—Mortmain - **597**
See CHARITY. 2.

PRESCRIPTION - - - - **500**
See RIGHT OF COMMON.

PRIORITY — Mortgages — Acceleration — Bankruptcy of mortgagor - - **735**
See MORTGAGE. 1.

PROBATE—Proceedings in Chancery Division **98**
See WILL. 11.

—— Renunciation of - - - - **531**
See CONVERSION. 1.

PROFITS—Participation in - - - **303**
See PARTNERSHIP. 2.

PROMISSORY NOTE—Husband and wife - **728**
See HUSBAND AND WIFE. 3.

PROMOTER—Profit by - - - **371**
See COMPANY. 4.

PROOF—Bankruptcy - - - **790**
See BANKRUPTCY. 7.

PROTECTION OF WITNESS - - **230**
See EVIDENCE.

PROVISIONAL LIQUIDATOR — Costs of former petition - - - **102, 112**
See COMPANY. 12, 13.

PUBLIC—Right of admission—Examiner's office
See PRACTICE. 15. [**109**

PUBLIC HEALTH ACT, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 155, 156, 251, 252, 254—*Street—Building beyond Frontage Line—Consent of Local Authority—Penalties—Injunction to restrain Criminal Proceedings—Equity Jurisdiction.*] A Court of Equity has no jurisdiction to restrain criminal proceedings for the recovery of a penalty imposed by an Act of Parliament for a breach of its enactments.—A board having statutory power to consent in writing to a particular act is not bound by tacit acquiescence.—The Plaintiffs, owners of a house and area situate in and fronting a street, altered the front of the house by throwing out bay windows projecting beyond the street line of frontage but not beyond the limits of the area. After the completion of the alterations the Defendants, the local authority, threatened the Plaintiffs with summary proceedings before the justices for the recovery of penalties under the *Public Health Act*, 1875, on the ground that the Plain-

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PUBLIC HEALTH ACT, 1875—*continued.*
tiffs had set forward their building without the written consent of the Defendants under sect. 156 of the Act.—The Plaintiffs then moved *ex parte* for an injunction to restrain the Defendants from taking these proceedings, alleging, 1, that as the alterations had been made over their own property, the Defendants, in threatening proceedings, were acting *ultrà vires*; 2, that the Defendants, having had notice of the Plaintiffs' intention to make the alterations, were bound by acquiescence; and 3, that the justices had no jurisdiction, as the Defendants had not made their complaint within six months after the alleged offence, as required by sect. 252 of the Act.—Motion refused.—*Mayor of York* v. *Pilkington* (2 Atk. 302) disapproved of.—Observations on *Lord Auckland* v. *Westminster Local Board of Works* (Law Rep. 7 Ch. 597). KERR *v.* CORPORATION OF PRESTON - 463

PUBLIC LIBRARY — Book in — Publication of patent - - - - 412
See PATENT. 1.

PUBLICATION—Patent—Book in public library
See PATENT. 1. [412

RAILWAY COMPANY—Lands Clauses Act 696, 491
See LANDS CLAUSES ACT. 1, 2.

RATE—Paving—New street - - 539
See METROPOLIS MANAGEMENT ACT.

REAL ESTATE—Conversion - 531, 566
See CONVERSION. 1, 2.

—— Will—"Residuary legatee" - - 24
See WILL. 8.

RECEIVER—Bankruptcy - - 57, 181, 255
See BANKRUPTCY. 8, 9, 10.

RECITAL—False—Fraudulent settlement 29
See FRAUDULENT CONVEYANCE.

RECONSTRUCTION OF COMPANY - 627
See COMPANY. 5.

REDEMPTION—Suit for—Discovery - 613
See PRACTICE. 12.

REGISTRAR—District—Powers of - 692
See PRACTICE. 13.

REGISTRATION — Mortgage by company to director—Sub-mortgage - - 556
See COMPANY. 11.

REMAINDERMAN — Timber — Proceeds of—Income - - - - 139
See WASTE.

REMOTENESS OF DAMAGE—Loss of profits 153
See FRAUDS, STATUTE OF. 1.

RENEWABLE LEASEHOLDS—Purchase of—Reversion - - - - 706
See TENANT FOR LIFE. 2.

RENT—Future—Claim in winding-up - 744
See COMPANY. 8.

—— Specialty debt—Rent - - - 610
See ADMINISTRATION. 2.

RENUNCIATION OF PROBATE - - 531
See CONVERSION. 1.

REPUGNANCY—Absolute gift with gift over 1
See WILL. 1.

REPUTATION—Injury to - - - 582
See PRACTICE. 17.

RESIDUARY GIFT — Residuary legatee — Real estate - - - - - 24
See WILL. 8.

REVERSION—Value of—Mode of calculating 649
See TENANT FOR LIFE. 1.

RIFLE PRACTICE—Nuisance - - 521
See DEFENCE ACT.

RIGHT OF COMMON—*Lammas Lands—Right of Pasture—Common Appurtenant—Prescription—Long Enjoyment—Presumption of Legal Origin—One Commoner suing for himself and others—Pleading—Claim uncertain and unreasonable—Demurrer.*] The Plaintiffs alleged in their statement of claim that they were owners and occupiers of lands and houses in a parish in which were certain lammas lands, partly freehold and partly copyhold of two manors, and over which the "owners and occupiers of lands and tenements" in the parish had from time immemorial "enjoyed as appurtenant to their respective lands and tenements in the parish a right of pasture for the cattle commonable thereon during the season between the removal of the crops in each year and the time of preparing the land for sowing in the next succeeding year;" that the precise commencement and close of the season was regulated by bye-laws made by the homage of one of the manors, the number of cattle which each owner or occupier was entitled to turn out in respect of his tenement being proportioned to the annual value of the tenement according to a scale fixed by the homage; and that the Defendant, the lord of the manor and tenant for life of the lammas lands, had recently inclosed parts of such lands, and had destroyed the pasture thereof, thereby depriving the Plaintiffs and such other owners and occupiers as aforesaid of their rights of pasture. The Plaintiffs, suing on behalf of themselves and all other owners and occupiers of lands and tenements in the parish, claimed by their action, (1) a declaration that they were entitled, "as appurtenant to their several lands and tenements within the parish, to a right of pasture upon the lammas lands for all their cattle commonable thereon during the season aforesaid, and under such regulations as should from time to time be prescribed;" (2) an injunction restraining the Defendant from inclosing any part of the lammas lands, and from destroying the pasture thereon, and otherwise interfering with the exercise by the Plaintiffs and such other owners and occupiers as aforesaid of their said rights; and (3) the quieting the Plaintiffs and the other persons entitled as aforesaid in the possession of their said rights.—The Defendant demurred to the statement of claim on the ground that the prescriptive right thereby claimed was uncertain and unreasonable, and could not be claimed for such a body of persons as that for whom the same was claimed; and that the general right set up by the Plaintiffs could not be claimed by prescription.—Demurrer allowed, with costs, but with liberty for the Plaintiffs to amend.—In order to make a right of pasture over common or lammas lands appurtenant to particular lands there must be some relation between the enjoyment of the right and the enjoyment of the particular lands; that is, there must be some connection between the beasts used on those particular lands and the number or description of beasts that may be de-

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RIGHT OF COMMON—*continued.*
pastured on the common or lammas lands: as, for instance, where the right claimed is for the beasts which plough the particular lands; or, for every beast used on such lands not exceeding a certain number.—In an action claiming rights of pasture, or rights of a like nature, it is the duty of the Court, as far as possible, to attribute a legal origin to such rights, where there is evidence of long-continued user, but that duty can only be discharged at the trial. BAYLIS *v.* TYSSEN-AMHURST [500

RULES OF SUPREME COURT, 1875. Order XIII., r. 9 - - - - - 694
See PRACTICE. 20.
—— **Order XIV., rr. 1, 6** - - - 215
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—— **Order XVI., r. 2** - - - - 82
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—— —— **r. 13** - - - - 160
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—— **Order XIX., r. 3** - - - 748, 753
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—— **Order XXII., rr. 5, 9** - - - 748
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—— **Order XXVII. r. 5** - - - 748
See PRACTICE. 9.
—— **Order XXIX., r. 10** - - - 694
See PRACTICE. 20.
—— **Order XXXI., r. 19** - - - 256
See PRACTICE. 11.
—— **Order XXXV., rr. 1, 1a.** - - 692
See PRACTICE. 13.
—— —— **rr. 1, 2, 4** - - - - 193
See PRACTICE. 21.
—— **Order XXXVI., rr. 3, 8** - - 113
See PRACTICE. 22.
—— **Order XXXVIII., r. 8** - - - 82
See COMPANY. 2.
—— **Order XL., r. 11** - - - - 694
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—— **Order XLVI., r. 1** - - - 364
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—— **Forms Nos. 10, 14, 24** - - - 753
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SALE—By Court - - - - - 193
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—— By sheriff—Bankruptcy - - 332
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—— Goods - - - - - - 783
See SALE OF GOODS.
—— Land—Devise for—Election to take as land
See CONVERSION. 2. [566
—— Land - - - - - 196, 469
See VENDOR AND PURCHASER. 1, 2.
—— Partition Act - - - - 553
See PARTITION.

SALE OF GOODS—*Stoppage in Transitu—Unpaid Vendor—Arrival of Goods at Destination—Possession of Carriers also Warehousemen.*] Goods were purchased of *B.* in *London* by *A.*, residing at *Falmouth*. On the 27th of October, 1876, *B.* delivered the goods for shipment on a steamer calling at *Falmouth*, and on the same day posted an invoice to *A.* On the 29th of October the steamer left *London*, and on the 31st arrived at *Falmouth*, where the goods were discharged on the quay and taken to the warehouse of *C.*, who was the agent of the *Steam Packet Company*, and in the habit of holding goods landed from the steamers at the risk and subject to the order of the consignees, and also with the exclusive right as between himself and the *Steam Packet Company* of delivering goods to the consignees.—On the 30th of October *A.* committed an act of bankruptcy by absconding from *Falmouth*, and on the 4th of November, 1876, he was adjudicated bankrupt.—On the 4th of November *B.* telegraphed instructions to *C.* not to deliver the goods:—*Held*, that the *transitus* had not ended on the arrival of the goods at *Falmouth*, and transfer to the warehouse of *C.*, who, in the absence of instructions, held them as forwarding agent, and not as an agent for *B.* to keep the goods; and, accordingly, that the right of *B.* as unpaid vendor, to stop the delivery of the goods prevailed as against the claim of *A.*'s trustee in bankruptcy. *Ex parte* BARROW. *In re* WORSDELL - 783

SECRET PROCESS—Manufacturer—Right to use of name - - - - - 574
See TRADE NAME.
SECURITY—Debtor's summons - - 215
See BANKRUPTCY. 3.
—— Interest in profits—Test of partnership 303
See PARTNERSHIP. 2.
—— Provisional liquidator - - - 112
See COMPANY. 12.
SEPARATE ESTATE—Married woman - 728
See HUSBAND AND WIFE. 3.
SERVICE—Petition—Confirmation of Sales Act
See CONFIRMATION OF SALES ACT. [104
SET-OFF—Legacy—Abatement - - 591
See WILL. 3.
SETTLEMENT—*After-acquired Property—Covenant—Change in State of a Fund—Contingent Interest falling into Possession—Words pointing to Futurity.*] By an ante-nuptial marriage settlement the intending husband covenanted that in case at any time during the joint lives of the husband and wife any future portion or real or personal estate whatsoever exceeding a specified sum should come to or devolve upon the wife, or the husband in her right, by or under the will of a person named, or by or under any other will, donation, or settlement, or by any person dying intestate, or otherwise howsoever, and whether in possession, reversion, remainder, contingency, or expectancy, the husband and all other necessary parties would from time to time effectually settle or concur with the wife in all reasonable acts and deeds effectually to settle all such future portion, real or personal estate, in manner therein mentioned:—*Held*, that a fund to which at the date of the settlement the wife was entitled contingently on the happening of two events which

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SETTLEMENT—*continued.*
happened during the coverture was bound by the covenant. *In re* MICHELL'S TRUSTS - 618

2. —— *Marriage—Wife's after-acquired Property—Covenant to settle Property from particular Source—Determination of Coverture—Property acquired after.*] A covenant to settle after-acquired property will, in the absence of indications of a contrary intention, be read as limited to the duration of the coverture, and this though the covenant relates only to property from a specified source. *In re* CAMPBELL'S POLICIES - 686

—— Election - - - - - 671
See ELECTION.

—— Fraudulent—13 Eliz. c. 5 - - 29
See FRAUDULENT CONVEYANCE.

—— Voluntary - - - 87, 144
See VOLUNTARY SETTLEMENT. 1, 2.

SHARES—Paid up—Allotment in consideration of future work - - - 681
See COMPANY. 10.

—— Preference and deferred - - 511
See COMPANY. 7.

SHAREHOLDERS—Insolvent—Contribution by others - - - - 447
See COMPANY. 3.

—— Suit in name of company - 70, 82
See COMPANY. 1, 2.

SHOOTING—Mortgagee in possession - 173
See MORTGAGE. 2.

SOLICITOR—*Gift from Client—Influence.*] To prevent the operation of the rule that a solicitor shall not take a gift from his client while the relation subsists, there must not only be a total absence of fraud, misrepresentation, or even suspicion, but there must be a severance of the confidential relation. MORGAN *v.* MINETT - 638

2. —— *Handing over of Client's Papers to New Solicitors—Right to retain Letters of Client, and Copies of Letters in Letter-Book.*] A solicitor is entitled to retain as his own property letters addressed to him by his client and copies in his letter-book of his own letters to the client, after the client has transferred the business to which such letters related to other solicitors. *In re* WHEATCROFT - - - - - 97

3. —— *Lien—Mortgage—Costs due from Mortgagor—Mortgagee's Title Deeds—Same Solicitor acting for both Parties.*] A company having issued a debenture loan, a deed was prepared by their solicitor mortgaging their property to two of the directors as trustees for the debenture holders, the same solicitor acting also for the trustees. The mortgage contained a power of sale and the usual covenant against incumbrances. The company afterwards passed a resolution for a voluntary winding-up, whereupon the trustees acting under their power of sale contracted to sell the mortgaged property to a purchaser and applied to the solicitor for the company's title deeds, which were in his possession. He however refused to give them up, claiming a lien upon them for costs incurred by the company prior to the mortgage.—Upon a petition by the trustees and a debenture holder praying that the solicitor might be ordered to deliver up the title deeds to them:—*Held*, that the solicitor was not entitled to a lien on the

SOLICITOR—*continued.*
deeds, and that they must be delivered up to the Petitioners.—A solicitor acting for mortgagee as well as mortgagor in the preparation of a mortgage thereby loses his lien on the title deeds in his possession for costs due to him from the mortgagor, unless such lien is expressly reserved, even though the mortgagee may have known that the solicitor had such lien as against the mortgagor. *In re* SNELL (A SOLICITOR) - - - 105

—— Company—Promoter - - - 371
See COMPANY. 4.

—— Lien for costs—Charging order—Costs 553
See PRACTICE. 8.

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SPECIFIC PERFORMANCE - - 196, 469
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27 Eliz. c. 4—*Fraudulent Conveyances* - 87
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29 Car. 2, c. 3—*Statute of Frauds* 153, 517
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3 & 4 Will. 4, c. 27—*Limitations* - - 318, 719
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1 Vict. c. 26, s. 24—*Wills* - - - 122
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1 & 2 Vict. c. 110, s. 14—*Judgments* 130, 364
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8 Vict. c. 18, ss. 69, 75, 76, 77—*Lands Clauses Act* - - - - 491, 696
See LANDS CLAUSES ACT. 1, 2.
13 & 14 Vict. c. 60, ss. 3, 48, 51—*Trustee Act*
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15 & 16 Vict. c. 86, s. 31—*Chancery Improvement* - - - - - 109
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35 & 36 Vict. c. 66, s. 24—*Judicature Act* 731,
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36 & 37 Vict. c. 66, s. 25 - - 582
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—— —— ss. 34, 36 - - - 98
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STOP ORDER - - - - 553, 364
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STREET—Building beyond frontage line - 463
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SUIT BY SHAREHOLDER—Right to use name of company - - - 70, 82
See COMPANY. 1, 2.
SUPERVISION ORDER - - - 477
See COMPANY. 6.
SUPPORT—*Surface—Adjacent Land—Colliery—Excavation of Coal by Owners of Land not adjoining.*] Between the land of the Plaintiffs and that of the Defendants, who were owners of a colliery, there was an intermediate piece of land, the coal under which had been worked out some years ago by a third party. The effect of the cavity in the intermediate land was, that when the Defendants worked the coal under their land, subsidence was caused in the surface of the Plaintiffs' land. It was admitted that if the intermediate land had been in its natural state no injury would have been caused to the Plaintiffs by the Defendants' workings:—*Held* (affirming the decision of the Master of the Rolls), that the Plaintiffs had no right of action against the Defendants.—The support to which a landowner is entitled from the adjacent land is confined to such an extent of adjacent land as in its natural undisturbed state was sufficient to afford the requisite support. CORPORATION OF BIRMINGHAM *v.* ALLEN **C. A.** 284
SURFACE—Support of - - - 284
See SUPPORT.

TAXATION OF COSTS—District registry - 734
See PRACTICE. 14.
TENANT FOR LIFE—*Administration—Reversionary Interest—Mode of calculating Tenant for Life's Interest.*] Testatrix, being possessed of reversionary interests, bequeathed them to a tenant for life, with remainder over. Before the reversionary interests fell into possession, the devisee for life died.—The reversionary interests having afterwards fallen in:—*Held*, that, in estimating what was due to the estate of the devisee for life, the value of the reversions must be calculated as at the end of a year from the testatrix's death, on the assumption that they would fall in when they actually did; and that the devisee for life was entitled to £4 per cent. on that amount from the death.—*Wilkinson* v. *Duncan* (23 Beav. 469) followed. WRIGHT *v.* LAMBERT - - 649
2. —— *Devise of Freeholds, Copyholds, and Leaseholds—Trust to renew Leaseholds for Lives—Remainderman—Tenant for Life a Trustee—Purchase of Leaseholds for Lives and for Years—Purchase-money charged upon the Estates—Rights of Legal Personal Representative and Tenant in Tail.*] A testator vested his freeholds, copyholds, and leaseholds for lives or years determinable upon lives, in trustees in trust for his son, who was one of the trustees, for life, with remainder to his eldest son in tail. There was a trust to renew leaseholds for lives, but not for years. The tenant for life purchased the reversion in fee of a lease for lives, part of the settled estates (his own life being one), and the fee was conveyed to himself

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TENANT FOR LIFE—*continued.*

and co-trustee upon the trusts of the will, no intention being declared that the purchase-money was to enure for the benefit of those entitled under the will:—*Held*, that the estate of the tenant for life was entitled to the purchase-money, with interest from his death.—A tenant for life and sole trustee of settled estates, by will, purchased reversions in fee of leases for lives (his own life being one) and for years, parts of the settled estates, and the estates were conveyed, as to the reversion of the lease for lives, to him upon the trusts of the will; as to one of the reversions of the leases for years to him absolutely; and as to the other reversion of the leases for years to him upon the trusts of the will. He died while the leases for years would have been running out, and without having declared any intention that the purchase-moneys were to enure for the benefit of those entitled under the will. The first tenant in tail died in the tenant for life's lifetime intestate, leaving a widow, and a son heir in tail:—*Held*, that as to all the reversions purchased, the estate of the tenant for life was entitled to be repaid the purchase-moneys; that as regarded the legal personal representative of the first tenant in tail, both the estates of which there had been leases for years must be treated as being subject to those leases for the benefit of his first tenant in tail's estate; that as to the estate conveyed to the tenant for life absolutely, it belonged to the legal personal representative of the first tenant in tail; and that as to the other estate conveyed to him upon the trusts of the will, she was entitled to a leasehold interest of the same extent as the term would have conferred. ISAAC *v.* WALL - - - 706

—— Timber—Proceeds of—Income - 139
See WASTE.

TENANT IN TAIL—Renewable leaseholds for lives—Purchase of reversion - 706
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TIMBER—Mortgagee in possession - 178
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—— Proceeds of—Tenant for life and remainderman - - - - - 139
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TITLE BY POSSESSION - - - 696
See LANDS CLAUSES ACT. 2.

TITLE DEEDS—Solicitor's lien - - 105
See SOLICITOR. 3.

TRADE—Injury to - - - - 582
See PRACTICE. 17.

TRADE-MARK — *Infringement — Injunction — Lien for Costs—Costs of Stakeholder.*] On the granting of an injunction to restrain the infringement by the principal Defendant of the Plaintiff's trade-mark:—*Held*, that the Plaintiff was entitled to a lien for his costs of the action upon goods marked with the spurious mark which were in the hands of a wharfinger (a Defendant) who had received them from the principal Defendant in the ordinary course of business without knowledge of any fraud, and that this lien was superior to any lien of the wharfinger in respect of his charges, and to any rights of the trustee in bankruptcy of the principal Defendant, who had become bankrupt since the commencement of the action:—*Held*, also, that as the wharfinger had

TRADE-MARK—*continued.*

not unequivocally submitted to the order of the Court, but had insisted on the priority of his lien on the goods in respect of his charges, he had lost his right to be paid his costs of the action by the Plaintiff, and must, on the contrary, be made jointly liable for the Plaintiff's costs of the action. MOET *v.* PICKERING - - - - 770

2. —— *Secret Process of Manufacture—Knowledge of Process—Right to Use of Name.*] Any person who has become acquainted with the process of manufacturing an article which is in general secret is entitled to manufacture it, and if the name of the first manufacturer has become attached to the article, any person afterwards manufacturing is entitled to describe it by the name of such original manufacturer, and if he happens to be of the same name as the original manufacturer, he may use his name in describing his business, or allow it to be used by a company formed by him for the purpose of carrying on the business, notwithstanding that the representatives of the original manufacturer continue to carry on the old manufacture under the old name. MASSAM *v.* J. W. THORLEY'S CATTLE FOOD COMPANY - - - - - - 574

TRAMWAY COMPANY—*Parliamentary Deposit—Petition for Return of—Promoters—Creditors—Winding-up—Tramways Act*, 1870—*Board of Trade Rules*, r. 28.] The intention of the Board of Trade regulations under the *Tramways Act*, 1870, relative to the ultimate disposal of the deposit made by a tramway company on obtaining a Provisional Order authorizing the construction of their tramway, is, (1) That the promoters of the company are not, by any subterfuge or device to get back the deposit, either directly or indirectly, if the tramway is not completed: (2) That on an application under the 28th rule for application of the deposit, the creditors only are to be considered, and not the shareholders: and (3) That the only creditors to be considered are meritorious creditors, coming with a *bonâ fide* case. Otherwise the deposit will be forfeited to the Crown. *In re* LOWESTOFT, YARMOUTH, AND SOUTHWOLD TRAMWAYS COMPANY - - 484

TRANSITUS—Termination of - - 783
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TRIAL—By jury—Chancery Division - 113
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TRIVIAL INJURY - - - - 757
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TRUST—Husband and wife—Investment in three names - - - - - 115
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—— Sale of real estate—Will—Renunciation of probate - - - - 531
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TRUSTEE—Costs—Appeal - - - 281
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TRUSTEE IN BANKRUPTCY—Title of - 45
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TRUSTEE IN LIQUIDATION—Payment of mortgage debt - - - - 735
See MORTGAGE. 1.

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TRUSTEE ACT, 1850, (13 & 14 *Vict. c.* 60), *ss.* 3, 48, 51—*Vesting Order—Costs—Mortgagee of Unsound Mind, not so found—Application by Mortgagor.*] Where a mortgagee becomes of unsound mind, not so found, and the mortgagor applies for a vesting order on payment into Court of the mortgage debt, making the mortgagee a Respondent to the petition, the Court has no jurisdiction to make an order for the costs to be paid out of the mortgage debt, but each party must bear his own costs. *In re* SPARKS (A PERSON OF UNSOUND MIND) - - - - - - C.A. 361

UNSOUND MIND—Person of, not so found—Trustee Act - - - 361
See TRUSTEE ACT.

USE OF PROPERTY—Injury to neighbouring mine - - - - - 773
See MINE.

VENDOR—Goods—Stoppage *in transitu* - 780
See SALE OF GOODS.

VENDOR AND PURCHASER—*Specific Performance—Option to purchase—Condition Precedent—Delay by Purchaser in Possession.*] *M.* became tenant to *A.* of leasehold property for ten years from December, 1861, "*M.* to have the option at any time during the said term to purchase the premises for £3500, and upon payment thereof to *A.* the said term of ten years and the said rent shall thereupon cease, and *M.* shall thereupon be entitled to an assignment." *M.* entered into possession, and afterwards *A.* made a mortgage to *G.* In July, 1867, *M.* gave written notice to *A.* and to *G.* that he elected to purchase. A draft assignment was prepared, which could not be settled, since neither *A.* nor *G.* would assent to the purchase-money being paid to the other of them. A correspondence took place, which ended in March, 1868. *G.* having given notice to *M.* to pay his rent to him, *M.* made to him various irregular payments, for most of which receipts were given expressing them to be on account of rent, and this went on after the end of the term of ten years. In November, 1872, *A.* became bankrupt. On the 1st of May, 1873, the solicitor of *A.'s* trustee in bankruptcy called on *M.*, and stated that the trustee was going to sell, and wished to give him the refusal. *M.* desired time to consider, and did not say that he had already agreed to purchase. On the next day his solicitor discussed the matter with the trustee's solicitor, but did not set up any claim as having purchased. On the 13th of May, however, he wrote to the trustee's solicitor insisting on *M.'s* right under the agreement of 1861 and the notice of July, 1867, and the trustee disputing this right. *M.* filed a bill for specific performance:—*Held* (affirming the decision of *Hall*, V.C.), that the option in the agreement of 1861 and the notice of July, 1867, made a binding contract, although the purchase-money was not paid within the term:—*Held* (reversing the decision of *Hall*, V.C.), that *M.'s* right to specific performance was lost by the delay from March, 1868, to May, 1873, which was not excused by his having been in possession; for that possession, in order to have that effect, must be a possession under the contract, and such that the vendor must know, or be taken to know, that

VENDOR AND PURCHASER—*continued.*
the purchaser claims to be in possession under the contract; and in this case the Plaintiff did not, from March, 1868, to May, 1873, claim possession under thecontract, nor did it appear that the vendors recognised him, or were bound to recognise him, as claiming possession under it. MILLS *v.* HAYWOOD - - - - - C. A. 196

2. —— *Specific Performance—Right of Purchaser to separate Conveyances in Lots—Duty of Vendor to keep Property let and cultivated till Completion—Making Auctioneer holding Deposit Defendant.*] A vendor cannot object to convey to a purchaser in parcels by separate conveyances at one and the same time, if the purchaser requires him to do so and pays him the additional expense he thereby incurs; but *quære*, whether, in the absence of any stipulation, the vendor cannot object so to convey if the purchaser requires the conveyances to be made at different times.—When the vendor of a farm subject to a yearly tenancy finds that, without default on the part either of himself or the purchaser, the purchase cannot be completed on the appointed day, and that the tenancy will determine before actual completion, it is his duty as trustee for the purchaser, whether the tenancy be determined in the ordinary course by landlord or tenant or on a notice to quit given by the vendor at the request and for the convenience of the purchaser, to relet the farm on a yearly tenancy so as to prevent it going out of cultivation, unless he obtains an indemnity from the purchaser against all risk arising from its remaining unlet.—Although it is the law that an auctioneer holding the deposit on a purchase may be made a Defendant in an action for specific performance, yet, as a general rule, the proper practice is not to make him a Defendant when the deposit is of small amount, unless he refuses to pay it into Court when required; but where the deposit is of large amount, he may be properly made a Defendant, unless he has paid it into Court before action brought. EARL OF EGMONT *v.* SMITH. SMITH *v.* EARL OF EGMONT - 469

VESTING—Death without leaving issue - 239
See WILL. 10.

VESTING ORDER—Trustee Act - - 361
See TRUSTEE ACT.

VICAR—Contract for building church—Personal covenant - - - - 544
See COVENANT.

VOLUNTARY SETTLEMENT—*Covenant—Widow—Children of First Marriage.*] The performance of a covenant by a widow on her second marriage to convey property for the benefit of her children by a former marriage, if made in pursuance of an agreement between her and her intended husband, will be enforced at the suit of those children, and is an exception to the general rule that the performance of a covenant cannot be enforced by volunteers.—*Price* v. *Jenkins* (4 Ch. D. 483) considered. GALE *v.* GALE - - - 144

2. —— *Husband and Wife — Post-nuptial Settlement, voluntary or for Valuable Consideration—27 Eliz. c.* 4.] By a post-nuptial settlement certain freeholds belonging to the wife were settled by the husband and wife to the use of the wife for life, and after her decease to such uses as

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VOLUNTARY SETTLEMENT—*continued.*
she should by will appoint, and in default of appointment to the use of her children, with a power during her life for the wife to lease at rack rent, and with a power of sale and exchange in the trustees with her consent:—*Held*, that the settlement was for valuable consideration, and therefore not void under 27 Eliz. c. 4, and that the same must be upheld against a subsequent mortgagee. —*Goodright* d. *Humphreys* v. *Moses* (2 W. Bl. 1019) and *Currie* v. *Nind* (1 My. & Cr. 17) commented on.—*Butterfield* v. *Heath* (15 Beav. 408) disapproved. *In re* Foster and Lister - 87

VOLUNTARY WINDING-UP - 477, 511
See Company. 6, 7.

VOTE—Meeting of debenture holders - 627
See Company. 5.

—— Meeting of shareholders—Transfer of shares to increase votes - - - 70
See Company. 1.

WASTE— *Tenants for Life in Succession and Tenant in Tail—Cutting down Trees—Improvement of Estate—Funds in Court.*] An equitable tenant for life impeachable for waste cut timber not otherwise than in due course of management. The proceeds had been brought into Court and the income ordered to be paid to her. On her death her son, being the next tenant for life dispunishable for waste, petitioned for payment to him of the timber money in Court:—*Held*, that he was entitled to the money, as he would have been entitled to the trees which produced it. Lowndes *v.* Norton - - - - - 139

WATER—Discharged into neighbouring mine 773
See Mine.

WATERCOURSE—*Easement—Artificial Channel —Right to enlarge.*] A landowner granted to a company all the watercourses, dams, and reservoirs upon certain lands of his, which watercourses, dams, and reservoirs were laid down upon the annexed plan, which was to be taken as part of the deed, and were thereon coloured blue, and also the several streams and springs of water flowing into or feeding the said watercourses, dams, and reservoirs, with right for the company solely to take and use the water from the said springs or streams of water, watercourses, dams, and reservoirs, with powers to cleanse and repair, and with all such other powers as should be requisite for enabling the company to enjoy the premises thereby granted. The grantor was to be at liberty to use the waste or overflow water from the dams or reservoirs of the company, but was not to exercise this power if the company resolved that its exercise would be injurious to them. The property coloured blue on the plan consisted of an artificial watercourse, partly covered and partly open, the dimensions of various parts of which were specified on the plan, and in some cases it was noted on the plan that they might be enlarged to a certain extent. Several springs and streams feeding the watercourse were marked on the plan. The watercourse, it appeared, was large enough to carry off all the water which flowed into it except after heavy rain, but at one point of its course underground there was a contraction of the channel which after heavy rain backed up the

WATERCOURSE—*continued.*
water and caused a considerable overflow over a weir, of which overflow the grantor for many years had the benefit. The grantees having occasion for more water proceeded to remove the above obstruction, so as to allow the whole of the water which came into the watercourse during heavy rains to run down into their reservoir:—*Held* (affirming the decision of the Vice-Chancellor of the *Lancaster* Court), that the grant was a grant of the artificial channel, of the definite springs, and streams on the land, and of such other water as should find its way into and run down the channel as it stood, and not a grant of all the water on the land, and that the grantees had no right to alter the levels of or enlarge the channel so as to enable it to carry off all the water that ran into it in times of heavy rain. Taylor *v.* Corporation of St. Helens - - - - C. A. 264

WHARFINGER — Lien — Goods marked with spurious trade-mark - - 770
See Trade-mark.

WILFUL DEFAULT—Executor - - 562
See Administration. 1.

WILL—*Construction—Absolute Gift followed by Gift over of Property undisposed of — Devisee dying before Testator—Intestacy—Nomination of Executor—Trust for Next of Kin — Estoppel—Acknowledgment by Tenant for Life of Title of Remainderman.*] *T. S.* by will gave his real and personal estate to his brother *J.*, with full power to sell and dispose thereof by deed, writing, will, or otherwise, and appointed him "sole executor;" but in case *J.* should not dispose of the said real and personal estate, or any part thereof, and not otherwise, the testator gave the same, or such part thereof as he should not dispose of, to *J. H.* for life, with remainders over; and appointed another executor. The testator made various dispositions with special reference to the alternative of the survivorship of himself or *J.* *J.* died in the testator's lifetime. On the testator's death, in 1803, *J. H.*, claiming as tenant for life under the will, entered into possession of the real estate, and remained in possession till his death in 1869. He also received the income of the personal estate from the testator's personal representatives till 1863, when they transferred the capital to him on his indemnifying them. By a deed executed in 1842, the then personal representative had declared that he held the personal estate upon the trusts thereof contained in the will "or such of the same trusts as were then capable of taking effect."—*J. H.* having by will devised his real and personal estate to the Defendants, the Plaintiffs, who claimed to be entitled to *T. S.'s* real and personal estate under his gift in remainder after *J. H.'s* life estate, brought an action to establish their title against the Defendants, alleging that *J. H.* had acknowledged his title as tenant for life only.—On a demurrer by the Defendants, on the ground that the Plaintiffs had no title:—*Held*, by the Master of the Rolls, first (following *Hughes* v. *Ellis* (20 Beav. 193)), that the gift of the real and personal estate to *J.* was an absolute gift, and that all the gifts over were void; and that, consequently, *J.* having predeceased the testator, there was an intestacy; secondly, that *J. H.* was not estopped from setting up a statutory

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WILL—*continued.*

title to the real estate by his having wrongfully claimed to enter as tenant for life, or by his acknowledgment that he was in possession only as tenant for life; and, thirdly, that as to the personal estate, *T. S.* having by his will nominated an executor, the will created a trust in the executor for the next of kin; that the only trust of the will at the date of the deed of 1842 "capable of taking effect" was this trust for the next of kin; and that the Plaintiffs had no title either under the will or under that deed.—Demurrer allowed with costs.—The doctrine of estoppel considered and explained:—*Held*, on appeal by the Plaintiffs (reversing the decision of the Master of the Rolls on the first point), that, taking into consideration the whole will, the gift to *J.* must be read as a gift to him for life with an absolute power of appointment, and with a gift over if *J.* should die before the testator, or if he should survive but not dispose of the estate; and that in the event which had happened the gift over was valid.—Whether, in the absence of any controlling context, such a gift over would be valid in the event of the devisee dying before the testator—*Quære*—*Hughes* v. *Ellis* (20 Beav. 193) and *Greated* v. *Greated* (26 Beav. 621) questioned. *In re* STRINGER'S ESTATE. SHAW *v.* JONES-FORD [C. A. 1

2. —— *Construction—Wills Act* (1 *Vict. c.* 26), s. 24—*Advances made after Date of Will—Will speaking from the Date.*] A testator, after reciting that he had advanced to his son various sums of money, and that he was desirous that his son should be released from the said several sums, and that the securities held in respect thereof should be given up to him, bequeathed to his son all the aforesaid several sums, with the securities then in the testator's hands relating thereto, and he released him from payment of all such sums:—*Held*, that the will must be construed as speaking from the date and not from the death in respect of the advances made by the testator; and that the son was not released from the payment of money advanced between the date of the will and the death of the testator. EVERETT *v.* EVERETT 122

3. —— *Construction—Advances to Legatee—Set-off—Intention of Testator—Omission of Words.*] A testator directed his trustees to pay his son £3000 and to invest £28,000 upon trust as to £10,000 for his widow during widowhood, and as to six sums of £3000 upon trust for his daughters and their children. The £10,000 was to fall into the residue at the death or marriage of his widow. And the testator directed his trustees to divide the residue into as many equal shares as he should have children living at the time of the death or second marriage of his wife, or then dead leaving issue, and upon trust as to one of such shares to invest £1000 for his son and his son's widow and children, and he gave directions as to the settlement of the share given to one of his daughters; and the will provided that any money advanced to his children and not repaid at his death should be set off against their share of the residue. The testator's son was indebted to him for advances in a sum nearly equal to his share of the residue:—*Held*, that the legacy of £3000 to the son was not to be set off against his debt, but

WILL—*continued.*

was to be paid immediately:—*Held*, also, that the words in the will directing the residue to be divided between the children living "at the death or second marriage of his wife" must be struck out as being manifestly inconsistent with the form of the will and the intention of the testator; and that all the children living at the death of the testator took vested interests in the residue. SMITH *v.* CRABTREE - - - - 591

4. —— *Construction—Dying seised—Descent to Heir—Seisin in Law—Disseisin—Wrongful Possession by Stranger—Technical Words.*] *R.*, being seised of freehold houses, died intestate in 1864, leaving *A.* his sole heiress-at-law. Upon *R.'s* death his widow wrongfully entered into possession, and retained possession till her death in 1869, when her devisees entered. *A.* died in 1871, without ever having entered into possession, having devised to *L.* "all real estate (if any) of which she might die seised."—An action having been brought by *L.* against the widow's devisees for recovery of possession, the devisees demurred to the statement of claim on the ground that *A.'s* devise did not pass the property or any right of entry therein to the Plaintiff:—*Held*, that "seised" being a purely technical word must be construed according to its technical meaning; and that as the seisin in law which *A.* had on *R.'s* death had been destroyed, and she had not at her death any seisin either in law or in fact, the property did not pass under her devise.—Demurrer allowed, with costs. LEACH *v.* JAY - - - - 496

5. —— *Construction—Executory Gift over—Death without leaving Issue—Restriction to Period of Distribution.*] A testatrix devised lands to her daughter *S.* for life, with remainder to the husband of *S.* for life, and after the death of the survivor of them to all the children of *S.* by her then husband who should be living at testatrix's death as tenants in common in fee, and added a proviso giving over the shares of any of the children of *S.* who should "depart this life without leaving lawful issue" to the survivors or survivor of the children that should leave such lawful issue as tenants in common in fee:—*Held*, that the words "depart this life without leaving lawful issue" must be restricted to death without issue at the period of distribution, viz., the death of the surviving tenant for life.—*O'Mahoney* v. *Burdett* (Law Rep. 7 H. L. 388) and *Ingram* v. *Soutten* (Law Rep. 7 H. L. 408) distinguished. BESANT *v.* COX - - - - - - 604

6. —— *Construction—Mistake—Falsa Demonstratio—Enumeration of Closes of Estate—Omission of Two Closes.*] A testator gave all that part of *Rigby's* estate purchased by him consisting of closes *A.*, *B.*, *C.*, *D.*, *E.*, and *F.*, with the timber and coal mines, to trustees in trust for his son *J. O.* for life, with remainder to the use of *J. O.'s* children as he should by deed or will appoint, and in default of appointment to the use of *J. O.'s* right heirs. *J. O.*, by his will, after reciting the devise in his father's will (but without enumerating the closes), appointed all that part of the property devised by his father's will and therein described as that part of *Rigby's* estate purchased by his said father consisting of *A.*, *C.*, *B.*, and *F.*, with the timber, but not including the

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WILL—*continued.*

mines, to his two sons *T.* and *J.*; and he appointed the mines under the land which he had appointed to *T.* and *J.* to his four other children. The two omitted closes, *D.* and *E.*, lay between the other four.—A special case having been filed to obtain the opinion of the Court whether the two closes *D.* and *E.* passed under the appointment to *T.* and *J.*:—*Held* (affirming the decision of the Master of the Rolls), that the corpus of the estate devised by the father was sufficiently designated in the son's will, that the enumeration of the four closes instead of the six was a *falsa demonstratio* which might be rejected; and that the whole of the six closes passed under the appointment. TRAVERS *v.* BLUNDELL - C. A. 436

7. —— *Construction—Omission in Will supplied by Inference.*] Testator, having two sons and five daughters, by his will directed the residue of his real and personal estates to be divided, as a mixed fund, into sevenths, and bequeathed one seventh to one son, and another to the other son. He then bequeathed "the remaining five sevenths" upon trust during the respective lives of his daughters, *Elizabeth*, *Sarah*, *Eliza*, *Mary*, and *Hannah*, to invest and pay the income into the proper and respective hands of his said daughters (again naming them) in equal shares for their separate use. He then, from and after the death of *Elizabeth*, gave one fifth of the fund to the children of *Elizabeth*; from and after the death of *Sarah*, another fifth to the children of *Sarah*; from and after the death of *Eliza*, another fifth to the children (not of *Eliza*, but) of *Mary*; and from and after the death of *Hannah*, another fifth to the children of *Hannah*. He further gave directions, until the "part or share of the said trust-moneys of the issue of any of my said daughters" should become payable, to apply the same by way of maintenance.—The Court, holding that a clause giving to the children of *Eliza* an interest in one fifth of the trust fund similar to that which was given to the children of the other four daughters, and giving the children of *Mary* a like interest on the death not of *Eliza* but of *Mary*, had been accidentally omitted, declared that the will must be read as if it contained the omitted clause. *In re* REDFERN. REDFERN *v.* BRYNING - - - - - 133

8. —— *Construction—"Residuary Legatee"—General Words passing Real Estate.*] A testator commenced his will by saying, "As to my estate which God has been pleased to bestow upon me, I do make and ordain this my last will and testament, as follows." He then made separate dispositions of two specified farms, then gave several pecuniary legacies, then bequeathed his shares in a quarry, then gave some further pecuniary legacies, and concluded with "and I make *M. P.*, *R. H.*, and *O. P.* my residuary legatees": —*Held* (reversing the decision of *Hall*, V.C.), that the testator's freehold estate not specifically mentioned in the will passed to *M. P.*, *R. H.*, and *O. P.* HUGHES *v.* PRITCHARD - C. A. 24

9. —— *Construction—Specific Legacy—Ademption—Gift of "all the Real and Personal Estate which I am or shall or may be entitled to under the Will of A."—Receipt and Investment by Testator of Money derived from A.'s Estate.*] A testator devised and bequeathed to the Defendants "all the real and personal estate which I am or shall or may be entitled to under the will of my late uncle." And he bequeathed the residue of his personal estate to the Plaintiff. Between the date of the will and the time of his death he received from the estate of his uncle £800, and invested part of it in the purchase of a sum of £600 railway stock. He had previously purchased other sums of the same stock with his own money, and at the time of his death these sums, and the £600, remained standing as one sum in his name. *Held*, that the £600 stock passed under the gift to the Defendants. MORGAN *v.* THOMAS - 176

10. —— *Construction — Vesting.*] A testator gave £6000 to trustees upon trust to pay the income of one moiety to his daughter *J.* for her life, and the income of the other moiety to his daughter *A.* for her life. And from and immediately after the several deceases of each of the daughters "leaving lawful issue or other lineal descendants her or them surviving," upon trust "to pay, assign, and transfer" the fund of her or them so dying "unto her or their child or children or other lineal descendants respectively," to be equally divided between them if more than one, "such child or children or other lineal descendants to take *per stirpes* and not *per capita*, such principal trust moneys to be paid, assigned, and transferred to them respectively" at twenty-one, and the income in the meantime to be applied towards their maintenance and education; "but nevertheless the said parts or shares of the said child or children shall be absolute vested interests in him, her, or them immediately on the decease of his, her, or their respective parent or parents, and transmissible to his, her, or their executors or administrators respectively." There was a gift over, in case either of the daughters should die "without leaving any lawful issue or other lineal descendants her surviving," to the other daughter and her child or children or other lineal descendants. And, in case both of the daughters should die "without leaving any lawful issue or other lineal descendants her or them surviving," there was a gift over to other persons:—*Held*, that children of a daughter who predeceased her did not take.—The decision of *Hall*, V.C., reversed. SELBY *v.* WHITTAKER - - - C. A. 239

11. —— *Probate Proceedings in Chancery Division—Suppressed Will—Partition Action—Jurisdiction—Judicature Act*, 1873, *ss.* 34, 36—*Judicature Act*, 1875, *s.* 11.] A Plaintiff claiming a share of leaseholds, partly in the occupation of the Defendant, under an alleged will, which he charged was being fraudulently suppressed by the Defendant, brought an action claiming partition or sale, and to have the will established and directions given for probate. The Defendant denied all knowledge of the alleged will:—*Held*, first, that before the Plaintiff could obtain any relief upon the will, it must first be proved, or probate must be admitted by the Defendant; secondly, that a Judge of the Chancery Division had, under the Judicature Acts, jurisdiction to grant probate, but that it would not be using a sound discretion to exercise the jurisdiction.—Action accordingly ordered to stand over for probate proceedings to

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WILL—*continued.*
be taken in the Probate Division. PINNEY *v.* HUNT - - - - - - 98
—— Charitable gift - - - 205, 597
See CHARITY. 1, 2.
—— Conversion—Election to take as land
See CONVERSION. 1, 2. [531, 566
—— Election - - - - - 671
See ELECTION.
WINDING-UP.
See COMPANY. 6—13.
—— Mandamus—Practice - - - 731
See PRACTICE. 19.
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WITNESS—Answers tending to criminate 230
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—— Costs and expenses - - - 328
See PRACTICE. 23.
WORDS—"All that I am entitled to under will of A." - - - - 176
See WILL. 9.
—— "Injustice or unjust delay to creditors" 45
See BANKRUPTCY. 1.
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—— Pointing to futurity - - - 618
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—— "Rent" - - - - - 63
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—— "Residuary legatee" - - - 24
See WILL. 8.
—— "Seised" - - - - 496
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—— "Without leaving issue" - 239, 604
See WILL. 5, 10.

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